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No. 86-270

In the Supreme Court of the United States

OCTOBER TERM, 1986

SAN FRANCISCO ARTS & ATHLETICS, INC.
and THOMAS F. WADDELL, M.D.
Petitioners,

vs.

UNITED STATES OLYMPIC COMMITTEE
and INTERNATIONAL OLYMPIC COMMITTEE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX I

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PETITION FOR CERTIORARI FILED AUGUST 19, 1986
CERTIORARI GRANTED OCTOBER 20, 1986

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RELEVANT DOCKET ENTRIES

Date	Entry
August 9, 1982	Complaint filed.
August 9, 1982	Plaintiffs' Application for TRO and moving papers for preliminary injunction filed.
August 9, 1982	TRO granted after hearing.
August 16, 1982	Supplemental papers in support of preliminary injunction filed.
August 16, 1982	Papers in opposition to preliminary injunction filed.
August 19, 1982	Reply papers in support of preliminary injunction filed.
August 19, 1982	Hearing on motion for preliminary injunction held.
August 20, 1982	Order granting preliminary injunction filed.
August 23, 1982	Preliminary injunction issued.
August 23, 1982	Defendants' notice of appeal from preliminary injunction filed.
August 23, 1982	Defendants' ex parte motion for order staying preliminary injunction filed and denied.
August 27, 1982	Answer to complaint and counterclaims filed.
September 20, 1982	Answer to counterclaims filed.
November 8, 1982	Defendants' discovery papers filed.

RELEVANT DOCKET ENTRIES (Continued)

Date	Entry
February 9, 1983 & April 7, 1983	Plaintiffs' responses to defendant's discovery filed.
June 15, 1983	Notice of affirmance of preliminary injunction by U.S. Court of Appeals for Ninth Circuit issued.
July 29, 1983	Defendants' discovery papers filed.
September 16, 1983	Plaintiffs' moving papers for summary judgment filed.
September 22, 1983	Defendants' responses to plaintiffs' discovery filed.
October 3, 1983	Defendants' papers opposing summary judgment filed.
October 7, 1983	Reply papers in support of summary judgment filed.
February 2, 1984	Hearing on motion for summary judgment held and summary judgment granted.
February 16, 1984	Summary judgment entered.
March 15, 1984	Defendants' notice of appeal from summary judgment filed.
April 16, 1984	Plaintiffs' moving papers for attorneys' fees award filed.
May 10, 1984	Defendants' opposition to motion for attorneys' fees filed.
May 17, 1984	Reply papers in support of motion for attorneys' fees filed.

RELEVANT DOCKET ENTRIES (Continued)

Date	Entry
May 24, 1984	Hearing on motion for attorneys' fees held and attorneys' fees award granted.
September 21, 1984	Written order granting attorneys' fees issued.
April 1, 1985	Order of U.S. Court of Appeals for Ninth Circuit staying execution of judgment issued.
January 27, 1986	Opinion of U.S. Court of Appeals for Ninth Circuit affirming summary judgment and reversing and remanding attorneys' fees issued.
February 10, 1986	Petition for rehearing and suggestion of *en banc* review filed.
May 22, 1986	Order denying rehearing and *en banc* review and amending opinion of January 27, 1986 issued.
May 28, 1986	Opinion of Judges Kozinski, Pregeson and Norris dissenting from *en banc* review issued.
August 19, 1986	Petition for certiorai filed.
October 20, 1986	Certiorai granted.

In the Supreme Court of the United States
JANUARY TERM, 1987

File Date: August 9, 1982

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America,

Plaintiffs,

VS

SAN FRANCISCO ARTS & ATHLETICS, a California corporation; THOMAS F. WADDELL,

Defendants.

No. C-82-4183 RFP
Complaint:
(Copyright/Trademark/Unfair Competition)

JURISDICTION

1. This action seeks relief under the International Convention for the Protection of Intellectual Property and for unfair competition (15 U.S.C. § 1126(h)), for violation of the Amateur Sports Act of 1978 (36 U.S.C. § 371, et seq.), for Federal trademark infringement (15 U.S.C. § 1114); for false designation of origin, false description or representation (15 U.S.C. § 1125 (a)); for breach of contract between the parties; and for dilution of plaintiffs' distinctive marks (Cal.Bus. & Prof.Code, § 14330). The jurisdiction of this court arises under sections 1337 and 1338 of Title 28, United States Code. In addition, the court has jurisdiction because of the existence of a Federal question (28 U.S.C. § 1331).

PARTIES

2. Plaintiff, *INTERNATIONAL OLYMPIC COMMITTEE* ("IOC"), is a nonprofit organization created by the Congress of Paris of June 23, 1894, and organized and existing under the laws of Switzerland. IOC's principal place of business is Lausanne, Switzerland. Plaintiff, *UNITED STATES OLYMPIC COMMITTEE* ("USOC"), is a pri-

vate, nonprofit corporation duly chartered and existing under the laws of the United States of America (36 U.S.C. § § 371-396), having its principal place of business at Colorado Springs, Colorado. USOC does business in California and elsewhere in interstate commerce.

3. Defendant, *SAN FRANCISCO ARTS & ATHLETICS* ("SFAA"), is a corporation organized and existing under the laws of California, having its principal place of business in the City and County of San Francisco. SFAA does business in California and elsewhere in interstate and foreign commerce. Defendant *THOMAS F. WADDELL* ("Waddell") is a resident of the City and County of San Francisco. Plaintiffs are informed and believe, and on that ground allege, that Waddell is an organizer of SFAA and is its chairman.

FIRST CLAIM FOR RELIEF:
PROTECTION OF FOREIGN CORPORATIONS FROM UNFAIR COMPETITION AND TRADEMARK INFRINGEMENT, 15 U.S.C. § 1126(h)

4. IOC is entrusted with the control and development of The Olympic Games which are IOC's exclusive property and to which IOC owns all rights over their organization and control. USOC is responsible for protecting IOC and the Olympic movement in the United States and the integrity of The Olympic Games when held in the United States. The 1984 Olympic Games are scheduled to be held in the City of Los Angeles, California.

5. Switzerland and the United States are signatories to the International Convention for the Protection of Intellectual Property (21 U.S.T. 1583, T.I.A.S. No. 6923).

6. Beginning at a time unknown to plaintiffs but not later than 1981, and continuing thereafter, defendants have organized a series of athletic competitions and events to be conducted in San Francisco. These athletic competitions and

events are to be conducted commencing on or about August 28, 1982. Plaintiffs are informed and believe, and on that ground allege, that defendants will begin festivities preliminary to such athletic competitions and events before August 28 and may, in fact, have already begun such preliminary activities; to wit, the carrying of the flaming Olympic torch across the Untied States.

7. Since at least December 1981, defendants have used "Olympic" in connection with the competitions and events described in paragraph 6, above. Specifically, defendants have promoted their competitions and events as the "Gay Olympics" or "Gay Olympic Games," have published a newsletter entitled "Gay Olympics," have printed or caused to be printed and have distributed brochures, flyers, tee shirts, bumper stickers, buttons and other materials which use "Olympic" and the phrases "Gay Olympics" or "Gay Olympic."

8. Plaintiffs are informed and believe, and on that ground allege, that SFAA attempted to register "Gay Olympic Games" as its California corporate trade name, but was informed that use of "Olympic" was not permitted, and was further informed that any use of "Olympic" was prohibited without authorization of USOC.

9. On December 23, 1981, USOC requested that the defendants cease and desist from using "Olympic" in consideration of forebearance by USOC of its right to bring legal action to enforce its rights. Plaintiffs did in fact forebear from enforcing their rights. Plaintiffs are informed and believe, and on that ground allege, that defendants ceased use of "Olympics" and instead called their athletic competitions and events "The Gay *Athletic* Games." Subsequently, defendants resumed use of "Olympic" to the detriment of plaintiffs.

10. Defendants have and will continue to compete unfairly with plaintiffs, through the unauthorized use of "Olympic" as well as the various recognized Olympic symbols including the "Olympic Torch" and the "Olympic Flame."

11. Plaintiffs have been and will continue to be immediately and irreparably injured by defendants' conduct as a result of the loss of plaintiffs' exclusive control and jurisdiction over The Olympic Games, the loss of plaintiffs' reputation and goodwill due to mistaken affiliation or association of defendants with The Olympic Games or deception engendered by defendants' continued misuse of "Olympic" and plaintiffs' other exclusive names, marks, designations, symbols, emblems and ensignia.

12. Plaintiffs have no plain, speedy or adequate remedy at law to redress defendants' misconduct.

13. Plaintiffs have necessarily engaged the services of counsel to represent them in the preparation and prosecution of the within action. The legal services rendered and to be rendered will inure to the benefit of the citizens of the United States of America as a whole in that defendants' unlawful conduct unfairly competes with The Olympic Games and the Olympic movement, interferes with the exclusive jurisdiction and control of plaintiffs over The Olympic Games and the Olympic movement and is contrary to the public interest. Such benefits will be derived in part through the efforts of plaintiffs who, therefore, request the Court in its discretion to fix the reasonable value of their attorneys' fees and litigation expenses and assess the amount thereof against defendants.

W h e r e f o r e, plaintiffs seek relief as hereinafter set forth.

SECOND CLAIM FOR RELIEF:
VIOLATION OF OLYMPIC
COMMITTEES' EXCLUSIVE
JURISDICTION PROVISIONS OF
AMATEUR SPORTS ACT OF 1978,
36 U.S.C. § § 373, 374

14. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 9, and 11 through 13, above.

15. USOC has exclusive authority to organize, finance and control the representation of the United States in The

Olympic Games and to exercise exclusive jurisdiction over organization of The Olympic Games when held in the United States.

16. Defendants have organized and promoted and will continue to promote international athletic competitions and events identified by defendants as "Olympic Games," in violation of provisions of the Amateur Sports Act of 1978 granting USOC exclusive jurisdiction to organize and control United States participation in The Olympic Games (36 U.S.C. § § 373, 374).

W h e r e f o r e, plaintiffs seek relief as hereinafter set forth.

THIRD CLAIM FOR RELIEF:
VIOLATION OF OLYMPIC SYMBOLS PROTECTION PROVISIONS OF THE AMATEUR SPORTS ACT OF 1978, 36 U.S.C. § 380

17. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 9, and 11 through 13, above.

18. USOC possesses the exclusive right to use "Olympic" and "Olympiad" and the various other names, marks, designations, symbols, emblems and ensignia of The Olympic Games, and combinations and simulations thereof, in the United States for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance or competition.

19. USOC derives the bulk of the funds needed to support United States participation in The Olympic Games by authorization of the use of "Olympics" and the various names, marks, designations, symbols, emblems and ensignia referred to in paragraph 18.

20. Unless defendants are enjoined, they will continue to use "Olympics" and the various other names, marks, designations, symbols, emblems and ensignia of The Olympic Games in violation of the Olympic Symbol Protection provisions of the Amateur Sports Act of 1978 (36 U.S.C. §

380). As a proximate result of such conduct, plaintiffs have suffered and will continue to suffer immediate and irreparable injury, loss and damage, in that the value of plaintiffs' name will be impaired, and plaintiffs' business reputation and goodwill will be injured and plaintiffs' exclusive right to use "Olympics" in the United States will have been deprived.

W h e r e f o r e, plaintiffs seek relief as hereinafter set forth.

FOURTH CLAIM FOR RELIEF BY PLAINTIFF USOC AGAINST DEFENDANTS: TRADEMARK INFRINGEMENT, 15 U.S.C. § 1114

21. Plaintiff USOC incorporates by reference the allegations of paragraphs 1 through 9, 11 through 13, and 18 through 19, above.

22. Continuously since 1896, USOC and its predecessors have used "Olympics" for promoting, publicizing, and controlling the participation of the United States in The Olympic Games, as well as in representing the United States by selecting and obtaining the most competent amateur representation for competitions and events of The Olympic Games. This is evidenced by, inter alia, United States Service Mark Registration No. 789,795, and United States Trademark Registration No. 968,566, which are in full force and effect thereby constitute conclusive evidence of USOC's ownership of and exclusive right to use "Olympics" as a registered mark in commerce for such goods and services, as provided by 15 U.S.C. section 1065 and 1115.

23. Defendants, without authorization by USOC, have used "Olympics" in this judicial district and elsewhere for the solicitation of funds, for the purpose of trade, to induce the sale of goods and services, and to promote a theatrical exhibition, athletic performance or competition. Defendants' acts constitute infringement of USOC's registered mark.

24. Unless defendants are enjoined from using "Olympics," defendants will continue such use. As a proximate result, USOC has suffered and will continue to suffer immediate

and irreparable injury, loss and damage in that the public will be confused, the value of USOC trade and service marks will be impaired, and USOC's business reputation and goodwill will be injured. USOC has no plain, speedy or adequate remedy at law to redress the above misconduct.

W h e r e f o r e, plaintiff USOC seeks relief as hereinafter set forth.

FIFTH CLAIM FOR RELIEF:
FALSE DESIGNATION OF ORIGIN, FALSE DESCRIPTION OR REPRESENTATION
15 U.S.C. § 1125(a)

25. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 9, 11 through 13, and 18 through 19, above.

26. Defendants are not associated with any Olympic activity and plaintiffs have never authorized defendants to use "Olympics" for any purpose.

27. Defendants' use of "Olympics" constitutes deceptive matter which may falsely suggest a connection with an Olympic activity, by creating the false impression that defendants' activities, products and services are promoted, sanctioned, or conducted as an Olympic activity organized, conducted or authorized by plaintiffs.

28. Use by plaintiffs of "Olympics" in the organization of international amateur athletic competition and selection of athletes to participate in The Olympic Games is well and favorably known throughout the United States and the world, and the goodwill and reputation of The Olympic Games associated therewith have been and will continue to be jeopardized by defendants' unauthorized use of "Olympics" and efforts to organize "Olympics Games," to the extent that the public will be deceived by the mistaken belief that defendants' activities, goods and services are in some way associated or connected with an Olympic activity, or sponsored, promoted, sanctioned, authorized, certified, organized or conducted by plaintiffs.

29. Unless defendants are enjoined from using "Olympics," defendants will continue such use. As a proximate result of defendants' action, plaintiffs have suffered and will suffer immediate and irreparable injury, loss and damage in that the public will be deceived, the value of plaintiffs' trade names and marks will be impaired, and plaintiffs' business reputation and goodwill will be injured. Plaintiffs have no plain, speedy or adequate remedy at law to redress the above misconduct.

W h e r e f o r e, plaintiffs seek relief as hereinafter set forth.

SIXTH CLAIM FOR RELIEF BY PLAINTIFF USOC AGAINST DEFENDANTS: BREACH OF CONTRACT

30. USOC incorporates by reference the allegations in paragraphs 1 through 9, 11 through 13, and 18 through 19, above.

31. On or about January 18, 1982, USOC and defendant Waddell entered into a contract providing that defendants, and both of them, would cease using "Olympic." In consideration, USOC agreed to forego bringing legal action to enjoin such unlawful and infringing use.

32. The purpose of the agreement was to prevent confusion or deception of the public that defendants, or either of them, had any association with any activity of plaintiffs.

33. USOC is informed and believes, and on that ground alleges, that defendants ceased use of "Olympic" in connection with their planned athletic competitions and events and instead called them the "Gay *Athletic* Games." Subsequent to their said agreement, defendants unilaterally repudiated their agreement and resumed use of "Olympic."

34. Unless defendants are enjoined from using "Olympic," defendants will continue such use. As a proximate result of defendants' actions, USOC has suffered and will suffer immediate and irreparable injury, loss and damage in that the public will be confused and deceived, the value of

plaintiffs' name will be impaired, and plaintiffs' business reputation and goodwill will be injured. USOC has no plain, speedy or adequate remedy at law to redress the above misconduct.

W h e r e f o r e, USOC seeks relief as hereinafter set forth.

SEVENTH CLAIM FOR RELIEF: DILUTION

35. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 9, 11 through 13, and 18 through 19, above.

36. Defendants' unauthorized, knowing and intentional misuse of "Olympic" is likely to injure the reputation of plaintiffs and The Olympic Games by diluting the distinctive quality of "Olympic" as a designation associated with plaintiffs and The Olympic Games in violation of section 14330 of the California Business and Professions Code.

37. Unless defendants are enjoined from using "Olympic," plaintiffs will suffer immediate and irreparable injury by the dilution of the distinctive quality of their name. Plaintiffs have no plain, speedy or adequate remedy at law to redress the above misconduct.

PRAYER FOR RELIEF

W h e r e f o r e, plaintiffs pray for relief and judgment as follows:

1. For an order temporarily restraining, preliminarily and permanently enjoining defendants, and each of them:

(a) From using or causing to be used in any form whatever, for the purpose of trade or for any other purpose, including but not limited to theatrical exhibitions, athletic competitions or events, "Olympic," or any other trademark, service mark, trade name, designation, symbol, emblem or ensignia of plaintiffs, or any combination or simulation thereof;

(b) From making any statement or representation

tending to cause any person to believe that defendants, their agents, employees, officers, attorneys, representatives or any person participating or acting in concert with them, or any of them, are in any way connected with plaintiffs or with any Olympic activity; and

(c) From distributing, selling or in any manner whatever conveying any goods, services, documents or other tangible things which use "Olympic," or any other trademark, service mark, trade name, designation, symbol, emblem or ensignia of plaintiffs, or any combination or simulation thereof.

2. For an order that all documents, signs, brochures, flyers, shirts, bumper strips, printed matter of any kind and other tangible things in defendants' possession, bearing "Olympic" or any trademark, service mark, trade name, designation, symbol, emblem or ensignia of plaintiffs, or any combination or simulation thereof, be delivered up to plaintiffs for destruction.

3. For attorneys' fees and costs of suit herein.

4. For such other and further relief as the Court may deem proper.

Dated: August 9, 1982.

(Names omitted, J.A. 5, above)
Vaughn R. Walker (Signed)
Attorneys for Plaintiffs,
International Olympic Committee
and United States Olympic Committee

File Date: August 9, 1982

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Memorandum in Support of Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction

PRELIMINARY STATEMENT

Plaintiffs *INTERNATIONAL OLYMPIC COMMITTEE* ("IOC") and *UNITED STATES OLYMPIC COMMITTEE* ("USOC") seek to enjoin defendants from using "Olympic" in connection with organizing and conducting athletic competitions or events scheduled to commence on or about August 28, 1982. Preliminary festivities of these competitions — carrying the flaming Olympic torch across the country — may have already began or will begin before plaintiffs could bring on a request for preliminary injunction by regularly noticed motion.

The Olympic Games are the exclusive property of IOC. The Amateur Sports Act of 1978 (36 U.S.C. § 371 et seq.) grants to USOC sole authority to control United States participation in The Olympic Games and empowers USOC to prevent misuse of "Olympic" and the other distinctive trade name, trademark and service mark, emblems, symbols and ensignia of The Olympic Games. USOC's rights of action under the Amateur Sports Act are in addition to any rights of action USOC may have for unfair competition and trademark infringement under the Trademark Laws of the United States (15 U.S.C. § § 1125a, 1114) or for dilution under the California Business and Professions Code § 14330.

Specifically, section 380 of the Amateur Sports Act, in part, provides:

"(a) Without the consent of the USOC, any person who uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition

* * * * *

"(4) the words "Olympic" * * * or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] or any Olympic activity;

"shall be subject to suit in a civil action by the [USOC] for remedies provided in *** the Trademark Act of 1946.***"

Plaintiffs demonstrate in the affidavits filed herewith that in December of 1981, a USOC representative discovered that SFAA contemplated organizing athletic competitions and in that connection using "Olympic." USOC's Executive Director immediately sent a letter on December 23, 1981 demanding that SFAA cease all use of "Olympic" (Miller Aff.). SFAA Chairman, Dr. Thomas Waddell, a former Olympian himself, wrote to USOC indicating a prior awareness that unauthorized use of "Olympic" was impermissible. Waddell enclosed additional unauthorized "Olympic" materials that appealed for public donations by making reference to the "Olympic Committee" and "Olympic Headquarters." Waddell requested USOC's permission for use of these materials (Miller Aff.). In response, USOC reiterated its position and again demanded that both SFAA and Waddell cease use of "Olympic." Between January 13-15, 1982, USOC's executive director had a telephone conversation with Waddell regarding USOC's position. During this conversation, USOC's need to control use of "Olympic" was explained, as was the fact of authorization which had been given to the "Special Olympics" for the handicapped, and "Junior Olympics" for young athletes, pursuant to USOC's express mandate from Congress to provide for athletic

development of these special groups (see 36 U.S.C. § 374(1), (6) and (13)). An oral agreement was reached during that conversation that defendants would cease use of "Olympic." This agreement was confirmed by letter of January 18, 1982 from Dr. Waddell (Miller Aff.). In that letter defendants stated their commitment to substitute "Athletic" in place of "Olympic" and plaintiffs' counsel later received materials indicating that defendants had substituted the name "Gay *Athletic* Games " (Kline Aff.).

Shortly thereafter, Waddell wrote USOC's executive director. The letter expressed some dissatisfaction with the agreement. USOC's counsel responded, notifying defendants that they were expected to abide by their agreement to cease use of "Olympic" because USOC was abiding by its agreement not to bring suit to enforce its rights (Kline Aff.). In response, SFAA had its attorney write to USOC approximately two weeks later, stating the defendants' legal position that the agreement was, for various reasons, void or unenforceable (Kline Aff.). That letter contained a number of misconceptions, including, for example, that USOC was a governmental agency. In an effort to avoid a confrontation, USOC counsel responded, explaining the errors and referring to supporting legal authority. The USOC did not hear from defendants until discovery months later that defendants had resumed use of "Olympic" (Kline Aff., Preston Aff.)

During the interim, however, and believing the matter had been amicably resolved, a report was made to USOC Administrative Committee on April 16, 1982, that the defendant had written agreeing to discontinue use of "Olympic" (Kline Aff.).

USOC's first indication that defendants had resumed use of "Olympic," was early June 1982. A newspaper article from the San Francisco Sunday Examiner & Chronicle reported that the defendant intended to continue use of "Olympic" in connection with its athletic games. Shortly thereafter, USOC counsel initiated an investigation to ascertain whether, in fact, defendant had resumed use of "Olympic" in connection

with organizing international sports competitions (Kline Aff.).

As a result of that investigation, the Olympic Committee received on approximately June 17, 1982, a package of materials from the defendant. These materials included two large packets of douments which referred only to the "Gay *Athletic* Games" precisely as defendant previously had indicated it would do in its letter from Dr. Waddell of January 18, 1982 (Kline Aff.). However, some additional materials were also included, apparently of more recent origin, that once again used the term "Olympic Games" (Kline Aff.)

Because of this apparent resumption of unauthorized use, USOC informed IOC during a regularly scheduled meeting held in London, England, during the week of June 28, 1982 of the apparent contractual breach (Miller Aff.). This meeting was followed by telephone discussions on July 7 between USOC's counsel and counsel for IOC which were resumed at a meeting of those counsel on July 15, 1982 (Kline Aff.). On July 22, 1982, a draft complaint was forwarded by USOC to IOC. That complaint also was presented on July 23 at a regularly scheduled meeting of the USOC Administrative Committee on July 22-28, 1982, when a recommendation to bring this action was unanimously approved.

Apart from violations of the Amateur Sports Act, defendants are also liable for trademark infringement under the Federal Trademark Act, 15 U.S.C. section 1114(a). USOC owns valid Federal service mark and trademark registrations of "Olympic," both for services promoting, publicizing, and controlling the participation of the United States in the Olympic Games (Reg. No. 789,795) and for promotional material and souvenirs as well as advertisements to raise money to support the "Olympic" Games (Reg. No. 963,566). Defendants' promotional material and advertising for souvenir and contributions featuring "Olympic" directly conflicts with USOC's Federally registered "Olympic" marks.

Defendants were free to promote their activities in many ways without utilizing the "Olympic" theme. Instead, defendants chose to take a ride on the widespread public recognition and goodwill that surrounds any "Olympic" activity, such as the Olympic Games, by misappropriating USOC's registered OLYMPIC mark. Misuse of this registered OLYMPIC mark by defendants occurred in connection with offering of souvenirs for sale in newsletters and advertisements promoting its "Olympic" activities, uses embraced by the registrations protecting USOC's "Olympic" marks. Therefore, the statutory right to relief under 15 U.S.C. section 1114(1) has been fully met.

ARGUMENT

I. DEFENDANTS HAVE VIOLATED THE AMATEUR SPORTS ACT OF 1978.

The Amateur Sports Act of 1978, P.L. 95-606,92 Stat. 3045, created a new and independent cause of action, by which USOC could protect the distinctiveness, value and marketability of various "Olympic" designations. The Olympic Protection provision of the Act (36 U.S.C. § 380) protects USOC from any misuse of "Olympic," regardless of the particular goods or service. The scope of protection afforded is akin to that of an anti-dilution statute, such as section 14330 of the California Business and Professions Code.*

The scope of protection provided by anti-dilution statutes is considerably greater than that provided by traditional trademark or unfair competition theories in that protection does not depend upon the nature of the goods or services involved. Such statutes are "designed to prevent the gradual

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* Certain uses of "Olympic" are, of course, not prohibited by the Olympic Protection Statute. For example, uses of the word "Olympic" in news stories about the Olympics are not prohibited. This is provided for in the preamble of 36 U.S.C. § 380(a) which states that the uses of Olympic terminology that are prohibited are those done "for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance of competition."

whittling away of a firm's distinctive trademark or name" (*Allied Maintenance* v. *Allied Mechanical Trades* (1977) 300 N.E.2d 1162, 309 N.Y.S.2d 628).

As the New York Court of Appeals noted:

> "[I]t would be of no significance under our statute that Tiffany's Movie Theatre is not a competitor of, nor likely to be confused with Tiffany's Jewelry * * * It is not difficult to imagine the possible effect which the proliferation of various non-competitive business utilizing the name Tiffany's would have upon the public's association of the name Tiffany's solely with fine jewelry. The ultimate effect has been appropriately termed dilution."

Dilution of a trademark can seriously injure the mark's owner. As the public sees the mark on numerous different products the impact and value of the mark can only deteriorate. Moreover, the reputation of the trademark owner may, through undesirable mental associations by the public, become subject to tarnishment. Thus the rationale underlying the Olympic Protection statute is similar to that underlying an anti-dilution statute. That is "[t]he evil which the Legislature sought to remedy was not public confusion caused by similar products or services sold by competitors, but a cancer-like growth of dissimilar products or services which feeds upon the business reputation of an established distinctive trademark or name."

Thus subsection (a) of the Olympic Protection statute makes actionable any use in trade of "Olympic," whether or not such use would be actionable on a trademark or unfair competition theory. Further, subsection (c) provides that USOC shall have the exclusive right to use "Olympic." Thus, any unauthorized use of "Olympic" would be unlawful. By reserving the exclusive use of "Olympic" to USOC, the Olympic Protection statute forecloses the possibility of any other party obtaining any protectable rights in "Olympic." This permits USOC to utilize "Olympic" for all goods and services.

While the Olympic Protection statute serves some of the same purposes as the Federal Trademark act, its direct purpose is to benefit the public by ensuring that any use of "Olympic" is authentic. Subsection(b) of section 380 is Congress' recognition, endorsement, and express authorization of USOC's corporate participation program. It provides that USOC may authorize its contributors and suppliers to use "Olympic" designations in advertising that the "contributions, goods, or service were donated, supplied, or furnished to or for the use of, approved, selected or used by the [USOC] or United States Olympic or Pan-American team or team members."

If unauthorized users, such as defendants herein, were allowed to continue the use of "Olympic" in connection with any products or services, such misuse would conflict with USOC's exclusive right to authorize its contributors and suppliers to use "Olympic" in connection with their products and services, completely frustrating the purpose of subsection (b).

II. DEFENDANTS HAVE VIOLATED THE CALIFORNIA ANTI-DILUTION STATUTE.

California expressly has provided an action for *dilution* of a party's mark. California Business and Professions Code section 14330, provides in pertinent part:

> "Likelihood of injury to business reputation or of dilution of the distinctive quality of * * * a mark valid at common law, shall be ground for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source or service."

Thus, the mere fact of a loss of distinctiveness alone is sufficient to violate California law and to entitle the Olympic Committee to an injunction against such use (*Dall* v. *American Trial Lawyers Association* (1971) 15 Cal.App.3d 290, 92 Cal.Rptr. 220).

III. DEFENDANTS HAVE VIOLATED THE TRADEMARK LAWS OF THE UNITED STATES.

By using "Olympic," which is identical to the common law and registered "Olympic" service mark and trademarks of USOC defendant has infringed USOC's Federally registered trademarks and service marks in violation of 15 U.S.C. section 1114, and has competed unfairly with USOC in violation of 15 U.S.C. section 1125(a). USOC's registrations have become incontestable and constitute conclusive evidence of its exclusive rights to use "Olympic" as a mark for the goods or services recited therein (15 U.S.C. § 1115).

To establish liability under the Lanham Act section 49(a) (15 U.S.C. § 1125a), there need be no conscious association of defendant's goods or services directly with USOC, nor need there be any likelihood of confusion that defendants' goods or services stem directly from USOC. It is enough if the mistaken or deceptive impression is given that defendants' goods or service are in some way sponsored, approved, or associated with USOC or its activities. See, e.g., *Foxtrap, Inc.* v. *Foxtrap, Inc.* (D.C.Cir. 1982) 671 F.2d 636. Moreover, although such a showing is not necessary, if a mark was adopted for the purpose of basking in the reflected popularity of another, then a presumption is created that the name chosen will in fact give rise to such an association, or will infringe upon the other's mark (*Fleishman Distilling Corp.*, supra: *Ortho Pharmaceutical Corp.* v. *American Cyanamid Co.* (D.N.J. 1973) 361 F.Supp. 1032; *Q-Tips, Inc.* v. *Johnson & Johnson* (3 Cir. 1953) 206 F.2d 146, certiorari denied (1953) 346 U.S. 867). Defendant, for example, has announced its intention to use an "Olympic torch" to light an "Olympic flame" in a ceremony "that wildly rival the traditional Olympic Games."

Plaintiffs have used "Olympic" extensively: through media coverage of its various Olympic activities, including the upcoming Olympic Games to be held in Los Angeles during 1984; the efforts of educational groups, and filmed public

service announcements, as well as use on a wide variety of consumer products. The fame of the "Olympics" has created a "commercial magnetism" (*Mishewaka Mfg. Co.* v. *Kresge Co.* (1942) 316 U.S. 203).

However, USOC need not show that it suffered "economic disadvantage," or that the defendants' use of "Olympic" designations is "economically harmful" to the Olympic Committee. Rather the test is whether "the owner of a mark is damaged by a later use of a similar mark which places the owner's reputation beyond its control, though no loss in the business is shown" (*James Burrough Ltd.* v. *Sign of The Beefeater, Inc.* (7 Cir. 1976) 540 F.2d 266).

> "Any unauthorized use of a certain mark which would tend to connote that the prior user had in some way authorized the subsequent use of the mark infringes on the prior user's rights. It is immaterial whether the consumer might think that the prior user was manufacturing the subsequent product, whether it was being produced under the prior user's design or supervision, or whether it was being produced pursuant to some other arrangement with the prior user, so long as the subsequent use of the mark is likely to confuse the consumer and put the prior user's reputation in the marketplace beyond his control"
> (*Waples-Platter Cos.* v. *General Foods Corp.* (N.D.Tex. 1979) 439 F.Supp. 551, 574).

Thus whenever a consumer sees "Olympic" on a product or advertisement, the consumer is likely to believe that the goods are in some way connected with the Olympic Committee or its Olympic activities. The widespread knowledge and value of "Olympic" "creates the opportunity for others to ride on USOC's goodwill in the effort to attract customers to goods and services which may be thought by consumers to be in some way associated with" (*James Burrough Ltd.*, supra, 540 F.2d at 277. See also *Grotrian, Holfferich, Schultz Th. Steinweg Nachf.* v. *Steinway & Sons* (2 Cir. 1975) 523 F.2d

1331, 1342; *HHH Publishing Co., Inc.* v. *Brincat* (9 Cir 1974) 504 F.2d 713. This consumer group "includes the ignorant, the unthinking and the credulous, who, in making purchases do not stop to analyze, but are governed by appearances and general impressions" (*Florence Mfg. Co.* v. *J. C. Dowd & Co.* (2 Cir. 1910) 178 F.73). Accord, *Stork Restaurant* v. *Sahati* (9 Cir. 1948) 166 F.2d 348, 358; *AMF* v. *Skeetercraft Boats* (9 Cir. 1979) 500 F.2d 341, 355; *Lambert Pharmacal Co.* v. *Bolton Chemical Corp.* (S.D.N.Y. 1915) 219 F. 325 (Hand, J.). See also, *E. I. du Pont de Nemours & Co.* v. *Yoshida International, Inc.* (S.D.N.Y. 1975) 393 F.Supp. 502.

Any doubts or close questions should be resolved against defendants as latecomers who have acted at their own peril by resuming use of "Olympic" despite the refusal by the State of California (Miller Aff.) to allow inclusion of "Olympic" in SFAA's corporate name and the notification of misuse by USOC (e.g., *American Home Products Corp.* v. *Johnson Chemical Co* (2 Cir. 1928) 580 F.2d 102; *Fotomat* v. *Cochran, Inc.* (D.C.Kan. 1977) 437 F.Supp. 1231; *General Foods Corp.* v. *Borden Inc.* (N.D.Ill. 1976) 191 United States Patent Quarterly 674). Adoption by defendants of the "Olympic" mark with full knowledge and awareness of the Olympic Committee's exclusive rights, especially when coupled with the defendants' adoption and reliance upon an alternate mark such as "Gay Athletic Games" before resuming use of "Olympic," also establishes that defendant intended to trade upon the goodwill and "commercial magnetism" of the Olympic Committee and of the Olympics (e.g., *Stork Restaurant* v. *Sahati* (9 Cir. 1948) 166 F.2d 348; *Southland Corp.* v. *Schumbert* (S.D.Cal. 1968) 297 F.Supp. 477; *Glamorene Products Corp.* v. *Boyle-Midway, Inc.* (S.D.N.Y.1975) 188 United States Patent Quarterly 145).

IV. THERE IS NO CONSTITUTIONAL ISSUE OF FREE SPEECH OR DISCRIMINATION.

The defendants' claim of right to use "Olympic" is apparently based on a claim that the Olympic Committee is

in some fashion attempting to abridge defendants' right of free speech. However, as USOC counsel pointed out in his letter of February 22, 1982 (Kline Aff.), those issues are irrelevant, since there is *no state action* present. Nothing in the amateur Sports Act of 1978 gives the Federal government the right to exercise any form of control over any action taken by USOC, including an action to enforce the Olympic Protection provisions of the statute. Any decision by USOC to enforce those statutory rights would not be state action, and therefore could not give right to an actionable claim for the infringement of any constitutional rights (*DeFrantz* v. *United States Olympic Committee* (D.D.C. 1980) 492 F.Supp. 1181, affirmed per curiam (May 22, 1980) No. 80-1530).

Moreover, it is clear that the district court may act to enjoin defendants' *commercial* speech. See, e.g., *Dallas Cowboys Cheerleaders, Inc.* v. *Pussycat Cinema, Ltd* (2 Cir. 1979) 604 F.2d 200; *Reddy Communications, Inc.* v. *Environmental Action Foundation*) (D.D.C. 1979) 199 United States Patent Quarterly 630). In *Dallas Cowboys Cheerleaders, Inc.*, the defendant showed a movie in which that plaintiff's trademarks appeared. In response to the defendant's first amendment privilege claims, that court held:

> "Plaintiffs' trademark is in the nature of a property right, and as such it need not 'yield to the exercise of First Amendment rights under circumstances where adequate alternative avenue of communications exist.' Loyd Corp. v. Tanner, 407 U.S. 551, 567 (1972). Because there are numerous ways in which defendants may comment on 'sexuality in athletics' without infringing plaintiff's trademark, the district court did not encroach upon their first amendment rights in granting preliminary injunction.
>
> "For similar reasons, the preliminary injunction did not constitute an unconstitutional 'prior restraint.' This is not a case of government censorship, but a private

plaintiff's attempt to protect its property rights. The propriety of a preliminary injunction where such relief is sought is so clear that courts have often issued an injunction without even mentioning the first amendment. The prohibition of the Lanham Act is content neutral, and therefore does not arouse the fears that trigger the application of constitutional 'prior restraint' principles" (604 F.2d at 200) (citations omitted).

V. PRELIMINARY INJUNCTIVE RELIEF IS APPROPRIATE IN THIS CASE.

The standards applicable to the instant motion for preliminary injunctive relief are well established. Temporary restraining orders and preliminary injunctions are appropriate if a party can demonstrate that (1) the probability of succeeding on the merits at trial; (2) irreparable injury will be suffered if a preliminary injunction is not granted; (3) no substantial harm to other parties will result from a preliminary injunction; and (4) the requested relief would not harm the public interest (see, *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., Inc.* (9 Cir. 1975) 526 F.2d 86).

(1) *Likelihood of Success.* The question of the Olympic Committee's likelihood of success on the merits has been addressed in Sections I, II and III, above.

injunction is not granted. The injury, or loss of distinctiveness, particularly through dilution, of "Olympic" cannot be measured in monetary terms. Goodwill is an inherently subjective measure which is often the most valuable asset of any corporation, as it is with USOC. Congress recognized this in expressly authorizing injunctive relief under the Federal Trademark Act and the Olympic Protection Statute, and it is under such circustances that preliminary injunctive relief is most appropriate.

(3) *There will be no substatial harm to defendant from an injunction.* Defendants had actually discon-

tinued using "Olympic" or had agreed to do so. Defendants' printed materials suggest a change from "Olympic" to "Athletic" terminology (Kline Aff.). It is only an apparently recent resumption by defendant of its unauthorized use which has prompted this action to prevent a continuation as well as expansion of such unauthorized use. Plaintiffs have no interest in preventing defendants from conducting their athletic competitions or other events. Consistent with its Congressionally mandated purpose of encouraging all Americans to participate in amateur sports (36 U.S.C. § 374), USOC's executive director conveyed to Dr. Waddell his personal wishes for the success of his endeavors, *under some other name* (Miller Aff.).

(4) *The public will benefit from issuance of an injunction.* Not only will the public not be harmed by issuance of the requested injunction, but will benefit from the prevention of any possibility of mistaken association between the parites. The Federal Trademark Act was passed expressly to prevent confusion of the public, and the Olympic Protection provision of the Amateur Sports Act was passed to enable USOC to carry out its Congressionally mandated responsibility to benefit the public through its activities. Anything which protects the interest of USOC as exclusively established by Congress, will of necessity accrue also to the benefit of the public.

VI. RELIEF.

Although the Amateur Sports Act created a cause of action independent of the Federal Trademark Laws the Olympic Protection provision affords USOC the same remedies that are available under the Trademark Laws. Consequently, in order to effectuate the purposes of the Amateur Sports Act and enable USOC to carry out its Congressional mandate, as well as to protect USOC from acts of unfair competition and dilution, plaintiffs should be awarded:

a. A permanent injuction, preventing defendants from using the term "Olympic," any "Olympic" symbol or any simulations that are confusingly similar thereto; in connection with organizing, promoting or conducting any athletic activities in the United States (15 U.S.C. § 1116);

b. An order requiring defendants to deliver up for destruction all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession or under the control of defendants displaying "Olympic" or any "Olympic" symbol or simulations thereof and all plates, molds, matrices and other means of making the same (15 U.S.C. § 1118); and

c. Costs and attorney fees in prosecuting this action (15 U.S.C. § 1117).

USOC does not have sufficient funds fully to implement all of the developmental programs it desires to conduct, much less to undertake costly legal action against all who might violate 36 U.S.C. section 380 by misuse of "Olympic." Requiring use of USOC's funds to enforce the statute against those who might violate it diminishes the amount of funding available to implement USOC's vitally important athletic programs. These programs benefit all Americans and are a source of national pride and accomplishment. The public interest would best be served by having the costs necessary for enforcement of the Olympic Protection statute be borne by those who violate that statute, rather than by the public's contributions. Thus, in order to allow USOC to enforce the statute as contemplated by Congress, while at the same time maintaining its development programs, attorney fees should be granted liberally under the statute. Such an award of attorney fees is particularly appropriate where, as here, the violation has been wilful and with disregard for USOC's preemptive rights.

CONCLUSION

For the foregoing reasons, and each of them, plaintiffs submit that the temporary restraining order and preliminary

injunction should issue as prayed.

Dated: August 9, 1982.

(Names omitted - see J.A. 5, above.)

by Vaughn R. Walker (Signed
Attorneys for Plaintiffs,
International Olympic Committee
and United States Olympic Committee

File Date: August 9, 1982

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Richard G. Kline in Support of Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction

RICHARD G. KLINE declares as follows:

1. I am one of counsel for plaintiffs herein and serve regularly as trademark counsel for plaintiff United States Olympic Committee. If sworn as a witness I could and would of my own personal knowledge competently testify under oath to the matters stated herein.

2. On or about February 2, 1982, I received by telecopier the packet of materials, true copies of which are attached hereto as Exhibit A. In response, I prepared the letter dated February 2, 1982 to Thomas F. Waddell, a true copy of which is attached hereto as Exhibit B. Thereafter, on February 16, 1982, my office received the letter dated February 12, 1982 from Mary C. Dunlap, a true copy of which is attached hereto as Exhibit C. I replied to the Dunlap letter by my letter of February 22, 1982, a true copy of which

is attached hereto as Exhibit D. Thereafter, I received no further communication from either Thomas Waddell or Mary Dunlap.

3. On June 4, 1982, I received a copy of a Bill Mandel column from the San Francisco Sunday Examiner regarding the "Gay Olympics" and as a result I initiated an investigation. I instructed a law clerk with my firm, Richard Schuett, to contact the organizers of the so-called "Gay Olympics" to obtain entry information. In response, Shuett received and gave to me the packet of material, true copies of which are attached hereto as Exhibit E. I instructed Schuett to obtain further information and Schuett informed me that he wrote the June 11, 1982 letter, a copy of which is attached hereto as Exhibit F. Schuett informed me that he received the items, copies of which are attached hereto as Exhibit G. On June 22, 1982, an article in the previous day's Washington Post concerning the "Gay Olympics" came to my attention; a true and correct copy of this article is attached hereto as Exhibit H.

4. I notified the International Olympic Committee and set in motion the steps necessary to obtain authorization to bring this action which has been brought as promptly after obtaining such authorization as practical.

5. Attached hereto in Exhibit I are true copies of U.S. Service Mark Registration No. 789, 795 and U.S. Trade and Service Mark Registration No. 968, 566. As regular trademark counsel for USOC, I am responsible for maintaining and enforcing these registered marks both of which are in full force and effect.

(Jurat omitted.)

(Exhibits omitted. Exhibits are in the Record, Docket #5.)

File Date: August 9, 1982

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Affidavit of F. Don Miller in Support of Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction

F. DON MILLER, being duly sworn, deposes and says:

1. I am Executive Director of the United States Olympic Committee ("USOC") and have served in that capacity since 1973. I have personal knowledge of the matters stated herein, could and would competently testify under oath thereto if called as a witness.

2. As Executive Director, I am the chief administrative officer of USOC principally responsible for the activities of USOC's full-time staff. I am familiar with USOC's activities, purposes, files and records.

3. USOC is solely responsible for organizing, financing and controlling United States participation in the competitions, events and activities of the International Olympic Games and the Pan American Games. The bulk of funds used to support the activities of the USOC are obtained through private donations and corporate contributors that are authorized to use the Olympic trade names, trademarks, symbols, insignia and emblems of USOC and Olympic symbol of the International Olympic Committee ("IOC"). USOC will raise approximately $40 million during the present four year quadrennium by authorizing the use of "Olympic" and USOC's trademarks, symbols, insignia and emblems. "Olympic" is the principal identification of USOC,

serving as the distinctive feature of its trade name and as a registered trademark and service mark for various goods and also services. In addition to authorizing use of "Olympic" in return for contributions and other consideration, USOC also has authorized use of "Olympic" to organizations which sponsor athletic competitions and events for handicapped persons (i.e., "Special Olympics") and for youth (i.e. "Junior Olympics" and "Explorer Olympics"). Except for these competitions and events, USOC has not otherwise authorized use of "Olympic" for use in connection with athletic competitions and events. USOC maintains a policy of objecting to any use of "Olympic" in connection with athletic competitions and events that USOC has not authorized and has, without exception, objected to any use of "Olympic" as a trade name in connection with athletic competitions and events coming to USOC's attention or knowledge.

4. In December 1981, I was informed that the Assistant Communications Director of USOC, Michael Moran, while in San Francisco, initially saw some use of "Gay Olympic Games" in connection with athletic competitions or events scheduled to begin in that city during the summer, 1982. I was further informed that the group sponsoring the "Gay Olympic Games" had initiated a publication "Gay Olympics" and had conducted a variety of promotional activities, including fund raising events. On December 23, 1981, I sent to Gay Olympic Games, in care of an address obtained by Mr. Moran, a letter requesting that use of "Olympic" in connection with these athletic competitions or events be discontinued. A true and correct copy of my December 23, 1981 letter is attached hereto as *Exhibit A*.

5. On or about January 4, 1982 I received a letter dated December 26, 1981, bearing the name and signature of Thomas F. Waddell. I am acquainted with a man of that name who competed in the 1968 Olympic Games at Mexico City. A true and correct copy of Dr. Waddell's December 26, 1981 letter is attached hereto as *Exhibit B*. Enclosed with that letter were the documents attached hereto as *Exhibit C*. On

January 6, 1982, I sent a letter of that date in response to Dr. Waddell's December 26, 1981 letter. A true and correct copy of my January 6, 1982 letter is attached hereto as *Exhibit D.*

6. On or about January 13, 14 or 15, 1982, I received a telephone call from Dr. Waddell who confirmed that he had in fact participated in the 1968 Olympic games. Dr. Waddell again requested that USOC authorize him and San Francisco Arts & Athletics ("SFAA") to use "Olympic" in connection with the 1982 summer athletic competitions and events scheduled in San Francisco. I reiterated the position I had taken in my January 6, 1982 letter. I told Dr. Waddell that the principal source of financial support for United States participation in the Olympic Games is authorization to use "Olympic" and other trademarks, symbols, emblems and insignia of USOC and that his group's use of "Olympic" in connection with athletic competitions or events in San Francisco would seriously impair USOC's fund raising activities. There is no restriction by the USOC or the IOC against participation in the Olympic Games by homosexuals and I am confident that homosexuals have participated in past Olympic Games. I further explained that USOC's objection to his group's use of "Olympic" did not reflect animosity or bias against gay people, but only that USOC objects to any group which attempts unauthorized use of "Olympic" in connection with athletic competitions or events. Dr. Waddell said that he understood USOC's position and that he and his group would cease use of "Olympic" in connection with the athletic competitions and events which he and his group planned. Thereafter, I received a letter of January 18, 1982 from Dr. Waddell acknowledging his agreement to cease use of "Olympic", a copy of which is attached hereto as *Exhibit E.* I acknowledged receipt of this letter by my letter of January 27, 1982, a true and correct copy of which is attached hereto as *Exhibit F.*

7. As a result of the foregoing, I assumed that "Olympic" would not be used in connection with the competitions and events SFAA and Dr. Waddell planned to organize, promote

and control. However, sometime after January 27, 1982 a letter was received from Dr. Waddell stating that he had been advised that he need not have agreed to cease use of "Olympic" and asking that the USOC change its position. He did, however, agree to continue to avoid the use of "Olympic" pending a resolution. That letter was referred to the USOC Counselor, who declined to modify the agreement. Copies of these letters are attached as *Exhibit G and H.*

8. I did learn in February 1982 that a lawyer named Mary Dunlap who purported to represent SFAA had written USOC that SFAA did not concede that USOC had exclusive right to "Olympic" in connection with athletic competitions or events. USOC did not, however, receive any information after my telephone conversation and correspondence with Dr. Waddell that SFAA had continued to use "Olympic." Consequently, USOC took no action. I did instruct members of the USOC staff to keep their eyes open for any resumed use of "Olympic" by SFAA. USOC received no such indication until a newspaper report was received and forwarded to the USOC Counselor in June 1982. A true and correct copy of this report is attached as *Exhibit I.* I instructed USOC staff and legal counsel to investigate.

9. As a result of this investigation further evidence of SFAA's resuming use of "Olympic" came to light. During the week of June 28, 1982, I brought the matter to the attention of the International Olympic Committee. At the first opportunity, I brought this matter to the attention of USOC's Administrative Committee on July 23, 1982 and obtained authorization for initiating legal action.

(Jurat omitted.)

(Exhibits omitted. Exhibits are in Record, Docket #6.)

File Date: August 9, 1982

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Affidavit of David Preston in Support of Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction

Affidavit of David M. Preston

STATE OF CALIFORNIA,
City and County of San Francisco. ss.

DAVID M. PRESTON, being duly sworn, deposes and says:

1. I am Press Liason Officer of the United States Olympic Committee ("USOC"), have personal knowledge of the matters stated herein, could and would competently testify under oath thereto if called as a witness.

2. Until April 1982, my principal occupation was Sports Information Director for the University of San Francisco. I am now self-employed in the field of sports marketing. Also since 1980 I have served as Press Liaison Officer for USOC. This is an appointive position but pays no salary or other compensation.

3. In December 1981, Mike Moran, Assistant Communications Director for USOC, informed me that a group in San Francisco was planning a series of athletic competitions and events called "Gay Olympics." Mr. Moran instructed me to keep my eyes and ears open for any information regarding these competitions or events and particularly any use of "Olympic" in that connection. Thereafter, nothing concerning these competitions or events came to my attention until

June 1982, when I received a telephone call from Mr. Moran who referred to an article in a San Francisco newspaper which stated that athletic competitions called the "Gay Olympics" were going to go forward in late August 1982. Mr. Moran asked me to find out what I could about these competitions.

4. On June 7, 1982, I received a call from Ron Rowan, General Counsel of USOC, who asked me to find out what I could about the "Gay Olympics" and, in particular, to find out if stationery, flyers or other printed material were being circulated using "Gay Olympics." On that same day I called Pacific Telephone's directory information service and asked if there was a telephone number for "Gay Olympics." I was told that there was such a number and that it was 861-8282. I called that number which was answered by a male voice stating "Gay Olympics." I asked "What is your parent company?" The person replied that it was called San Francisco Arts & Athletics Corporation and was a nonprofit group. The man stated that his group planned to present athletic games beginning August 1982 although not all of the locations for these competitions had yet been determined. Approximately one and one-half hours after this conversation, I again telephoned 861-8282 which again was answered by a male voice stating "Gay Olympic Games." I identified myself and said that I did sports marketing and promotions and wanted to know who to contact regarding the "Gay Olympics." The male voice on the other end of the telephone said that everyone worked without a salary but suggested I write Dr. Tom Waddell at Post Office Box 14874, San Francisco, 94114; the person to whom I talked said that Waddell was executive director of the Gay Olympics.

5. A couple of days or so after these telephone conversations I wrote and mailed a letter addressed to Tom Waddell at the address I had been given. The letter asked for information on the activities of San Francisco Arts and Athletics and its plans for the Gay Olympic Games. I stated that I was interested in making a proposal for marketing

activities in connection with the Gay Olympic Games and inquired whether Dr. Waddell felt my services might be of some value.

6. On June 21, 1982, I received a reply to my June 10 letter to Dr. Waddell. The envelope contained stationery with a logo and one or more of the documents bore the title "Gay Olympic Games." Nothing in the envelope responded to the questions I had put in my June 10 letter but gave two telephone numbers at which I could call Tom Waddell for answers to any questions that I might have. I sent the materials that I received on June 21, 1982, to Ron Rowan at USOC together with a newspaper article concerning the Gay Olympic Games which I also saw at about this time. On July 29, 1982, I saw a column by Art Rosenbaum in the San Francisco Chronicle regarding the "Gay Olympics"; a true and correct copy of this article is attached hereas to an exhibit.

(Jurat omitted.)

(Exhibits omitted. Exhibits are in Record, Docket #7.)

File Date: August 9, 1982

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America,

Plaintiffs,

vs.

SAN FRANCISCO ARTS & ATHLETICS, a California corporation; THOMAS F. WADDELL,

Defendants.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-82-4183 RFP

Temporary Restraining Order and Order To Show Cause

This matter having come on for consideration on the application of plaintiffs for a temporary restraining order and order to show cause why a preliminary injunction should not be issued; and it appearing that defendants have violated the Amateur Sports Act of 1978 and other provisions of law by unauthorized use of "Olympic" and plaintiffs' other names, marks, symbols, emblems and ensignia, and combinations and simulations, thereof and that said law violations have caused and will continue to cause plaintiffs to suffer irreparable loss, damage and injury:

It is hereby *ORDERED* that:

1. Pending the hearing on the order to show cause as set

out below, defendants, their employees, agents, officers, attorneys and representatives, all persons participating with or acting in concert with them, and each of them, shall immediately cease, desist and refrain from further use of "Olympic" or "Olympiad" or any confusingly similar word, term, name, trade name or any symbol, emblem, trademark or ensignia of the International Olympic Committee or the United States Olympic Committee, or any combinations or simulations thereof, for the purpose of trade, to induce the sale of any goods or services, or in connection with any advertising, promotion, publicity or production of any theatrical exhibition, athletic performance, competition or event.

2. Defendants shall appear before this Court at 9:30 a.m., or as soon therafter as the matter may be heard, on August 19, 1982, to show cause, if any there be, why they should not be enjoined as prayed for in the complaint herein, until the trial of this action.

It is further *ORDERED* that a copy of the complaint, memorandum of points and authorities, supporting affidavits and a copy of this order be served on defendants no later than August 10, 1982; and that any opposing papers be served and filed by defendants no later than August 16, 1982.

This order becomes effective upon the filing by plaintiff of a bond in the amount of $1000.

Dated: August 9, 1982.

Samuel Conti (signed)
United States District Judge

File Date: August 9, 1982

(Names & caption omitted in printing, see J.A. 5, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Hearing on T.R.O.: Reporter's Transcript
Reported by: Betti A. Ray, C.S.R.

The Clerk: *Civil 82-4183 RFP, International Olympic Committee* versus *San Francisco Arts and Athletics, Et Al;* plaintiff's application for a temporary restraining order.

Counsel, step forward and make your appearance known for the record.

Mr. Walker: Your Honor, I am Vaughn Walker representing The International Olympic Committee and The United States Olympic Committee.

Ms. Dunlap: Mary Dunlap for the defendants.

Good afternoon, Your Honor.

The Court: Good afternoon.

Anybody else?

Mr. Walker: My sssociate, Denise Amantea, Your Honor, and Richard Kline of the Washington, D.C. Bar. He is regular counsel for the United States Olympic Committee.

Ms. Dunlap: And Dr. Thomas Waddell, who is one of the named defendants in the action, Your Honor.

Mr. Walker: Your Honor, if I may proceed, we are seeking a temporary restraining order.

The Court: Excuse me just for one moment.

(Pause in Proceedings)

The Court: Proceed.

Mr. Walker: Thank you, Your Honor.

We are seeking a restraining order in connection with

***Mr. Walker** (cont.):* athletic competitions which are scheduled, to our knowledge, to commence in San Francisco on the 28th of August. There are some preliminary activities which apparently are going to commence before that time; an Olympic torch is to be carried across the country to these competitions and I believe that they are to arrive in San Francisco—or excuse me—the torch is to arrive in San Francisco on the 22nd of August.

The 1984 Summer Olympics Games, Your Honor, are to be held in Los Angeles. The International Olympic Committee is the party solely charged with the responsibility for organizing these events.

The United States Olympic Committee is charged, under a statute of Congress, with the responsibility of organizing all participation of the United States in the Olympic Games.

As part of that effort, Congress has afforded to the United States Olympic Committee the sole right to use "Olympic" and the Olympic Symbol, which are three interlocked circular rings, and the other emblems and insignia and marks, trademarks, trade names of the Olympic Games. All of that material is set forth in one or the other of the affidavits which we have submitted including the registered trademarks, which are attached to Mr. Kline's declaration, which we filed with our application.

The first indication that my clients had that the defendants were intending to conduct some international athletic competitions and events occurred in December 1981 when a publicity director for the United States Olympic Committee in San Francisco picked up some information about these activities.

Consistent with the U.S. Olympic Committee's regular policy, a formal letter was sent out to the defendants to discover the name of the organization which was sponsoring these activities and a request to cease and desist from use of "Olympic" was sent to San Francisco Arts and Athletics.

We received a response. We learned, as a result, that this organization was advised, when it sought to incorporate in

Mr. Walker (cont.): California, that it was advised by the Secretary of State's Office that the term "Olympic" was the exclusive right of the U.S. Olympic Committee to use and apparently the defendants were refused the corporate designation "Olympic" for their organization.

In any event, we later learned that the defendant, Dr. Waddell, was the chief person organizing these activities. He is, himself, a former Olympian, we understand; he participated in the 1968 Games in Mexico City.

He was requested by the Executive Director of the United States Olympic Committee to cease and desist from any use of "Olympic" and U.S.O.C. trademarks, trade names, emblems and insignia.

There was correspondence back and forth in January and February of 1982. The result of it was an agreement, or an understanding, as we have it, by the defendants that they would not use "Olympic". That is reflected in a letter sent by Dr. Waddell, which is attached to the Miller Affidavit. It is Exhibit E. Your Honor, a letter dated January 18, 1982 from Tom Waddell to Colonel Miller in which Mr. Waddell states, "We have, as an interim measure, blocked out the term "Olympic" and in all subsequent printed materials, will substitute the term "Athletic".

That was further amplified in a subsequent letter to Mr. Kline, I believe it was, which is attached to Mr. Kline's declaration as Exhibit A.

Mr. Waddell wrote, in a letter dated January 26, 1982:

"Until this controversy can be definitively resolved, we of the San Francisco Arts and Athletics, Incorporated, are making every reasonable effort temporarily to suspend and avoid use of the term "Olympic" in our non-profit organization's activities."

And there is evidence, Your Honor, that in fact, the defendants ceased use of the term "Olympic".

Their lawyer, Ms. Dunlap, subsequently followed up with a letter stating that she disagreed with the U.S. Olympic Committee's claim to exclusive right of use of "Olympic".

***Mr. Walker** (cont.):* The letter suggested the possibility of coming into court for declaratory relief. But nothing happened.

Nothing happened, Your Honor, until around the first of June the U.S. Olympic Committee learned, by receiving a newspaper article from the San Francisco Sunday Examiner that apparently, this group had resumed use of "Olympic".

Subsequently, an investigation followed, as is set forth in Mr. Kline's affidavit. Mr. Kline and officials of the International Olympic Committee took every step thereafter to make sure that both parties were fully coordinated and the decision to go forward and challenge the use by the defendants of the term "Olympic" and the U.S. Olympic Committee's exclusive trademarks was then brought before the court today.

Let me say, Your Honor, that there are several reasons why both the International Olympic Committee and the U.S.O.C. believe this matter is of great importance and why we are here on a temporary restraining order request.

The bulk of the funds that support United States participation in the Olympic Games come from private contributions and from corporate contributions, which are pursuant to authorizations by the U.S.O.C. for use of the term "Olympic" and/or the exclusive trademarks and trade names of the U.S. Olympics Committee. In other words, by licensing the trademarks and emblems and insignia, most of the money used to support American participation in the Olympic Games is raised.

In addition, what we have here is an infringement of these marks and names, not just by a neighborhood group getting together and calling some sort of contest like the Elm Street Olympics. We have here a group which is intending to sponsor athletic contests and competitions and events which resemble the Olympic Games.

Apparently—we understand—that there are participants coming from other countries. We understand that the entry into these contests is not limited to homosexual people, but

***Mr. Walker** (cont.):* anyone may come and participate.

In a very real sense, these events are competing with the Olympic Games to which the U.S.O.C. and the International Olympic Committee have exclusive right to govern, control and conduct. And because of the fact that the Olympic Games are going to be conducted in California in 1984, these contests of the defendant, we believe, are a very serious infringement of the right to control the Olympic Games as well as, of course, infringement of the exclusive marks and trademarks and trade names of the I.O.C. and the U.S.O.C.

Further, we had what we regard as an aggravated case by virtue of the recognition by the defendants of our exclusive right to use these terms and their agreement earlier, and statements to us that they were going to cease and desist and apparently have gone back on that understanding and agreement with us.

We believe that this matter should come to the court for a resolution on a preliminary injunction as soon as possible and in the meantime, we believe it's essential that the defendants be restrained from using our marks for "Olympic" in any way.

The Court: Okay.

Ms. Dunlap: Your Honor, I am pleased to say I agree with one thing that counsel said and that's that this matter should be set down for a hearing on the preliminary injunction as soon as possible.

I am informed by my clients that the Gay Olympic Games are to commence on the 28th of August, so I think it's in the interests of all the parties that this matter be resolved in legal terms as soon as possible.

Let me address the arguments counsel has made in regards to the purported likelihood of the plaintiffs' success on the merits and then turn to some of the other elements of the test for such preliminary or temporary relief as is sought today with the purpose, of course, of convincing the court that a temporary restraining order is not proper or appropriate in the case.

Ms. Dunlap *(cont.)*: Defendants' memorandum of points and authorities, which I received at or about 3:00 o'clock this afternoon, and which I have read, does not cite a case upon which we rely in significant part for our position that these defendants in this case have a perfect right to do what they have done with the term, "Olympic".

Counsel's argument also mentioned three Olympic Rings as a protected part of the trademark. The court will find, in a resort to the statute, Title 36 U.S. Code Section 379 or 380 that it is five rings that are protected.

It is correct that some of the Gay Olympic Games uses a three rings insignia. It is not within the symbolism protected as def—plaintiffs' counsel sought to mention.

But more at the heart of the matter is the case upon which we primarily rely for our position that this court should not grant a temporary restraining order for two primary reasons.

The first is that the purposes of the statutes upon which the plaintiffs rely have been found to be primarily a congressional intent to prevent commercial competition with the U.S. Olympic Committee.

The plaintiff, as is established by the defendants' exhibit, and I want to give the court the exhibit number, I believe it's exhibit—exhibit—I beg the court's indulgence for my unfamiliarity with these exhibit numbers is showing.

There is a letter or a document from the Gay Olympic Games to the law clerk who conducted this purported investigation of this entity's activity and in that letter or publication, it is recited that the defendant San Francisco Arts and Athletics is a non-profit organization.

The Court: That's from whom to whom?

Ms. Dunlap: That's from the San Francisco Arts and Athletics Group to—in correspondence or in communication with this law clerk who, apparently, corresponded representing his need for some information from the group. But I will find the document here.

The Court: That's not the one from Wadell is it, to Miller?

Ms. Dunlap: No, Your Honor although that document may well mention that they are a non-profit organization. There is no question that this organization is incorporated as a non-profit entity under California law. But there is a document among the defendants' documents that establishes that and I want that to be—

The Court: What are they incorporated as?

Ms. Dunlap: As a non-profit corporation.

The Court: What's the name?

Ms. Dunlap: San Francisco Arts and Athletics, Your Honor, and they are sued as a party defendant California corporation.

But I wanted to find this document so there will be no ambiguity as to the nature of this defendant. That's at the heart of the matter, Your Honor, because of the purpose of preventing and restraining commercial competition with the U.S. Olympic Committee.

The case upon which we rely, Your Honor, for both that interpretation of the statute and for purposes of our argument that the plaintiffs' activities are not banned nor prohibited by the laws—that the defendants' activities are not banned or prohibited by the laws the plantiffs cite is "Stop The Olympic Prison versus U.S. Olympic Committee". That's at 489 Federal Supplement, Page 1112. It's a Southern District of New York Opinion of 1980.

And let me briefly complete the terms of my argument, then I will find the court the reference about the defendant, but I want there to be no ambiguity of record that we are talking about a non-profit corporation here and about non-profit activity.

It was the thrust of plaintiffs' counsel's argument that Defendant U.S.—Plaintiff U.S. Olympic Committee had been damaged in, and the papers suggest this, although they certainly don't prove it, had been damaged by the fact that the use of the word "Olympic" is associated with an athletic event.

***Ms. Dunlap** (cont.):* As a practical matter, the use of the word "Olympic" in this case by a non-profit organization has not been shown, and we contend will not be shown, to in any way infringe, impede, intrude or restrain or limit the ability of the U.S. Olympic Committee to do all of its both commercial and non-commercial activities in furtherance of the Olympic Games and as a practical matter, the non-profit status of this defendant is at the crux of our position that the statutes upon which the plaintiffs rely are entirely distinguishable and inapplicable to the defendants in this case.

So on the part of the first prong for . . test of the propriety of temporary relief, we submit that there is no likelihood of the success of these plaintiffs on the merits because of the inapplicability of the statutes upon which they rely.

There is a further and perhaps more serious reason that this court should not conclude that they are likely to succeed on the merits, and that is that by their effort to use the courts to restrain these defendants from a non-commercial use of a word, "Olympic", it is our position that they are infringing upon the first amendment rights of speech and association, not only of the named defendants, but of all persons who might choose to participate in these non-profit and non-commercial activities.

The state action element here consists in two parts, and I notice, in the memorandum of the plaintiffs that the suggestion was made that there is no state action.

In this case, we contend that there is state action. One, by the fact that any injunction by this court establishes an involvement by the government and an enforcement by the government of a restraint on speech and although the U.S. Olympic Committee acting independently might or might not accomplish such a restraint under color of law, the courts having issued an order would certainly accomplish the requisite state action.

In that regard, the case cited by the plaintiffs on that point is distinguishable.

Ms. Dunlap *(cont.)*: The facts as presented to this court by plaintiffs' counsel are quite different from those in my record and I want to point out those parts of the differences that are significant.

Counsel, it seems to me, seeks to suggest to this court the plaintiffs were surprised by and have been taken aback by the defendant's use of the term "Olympic".

Your Honor's review of the correspondence in this case will unambiguously establish that the plaintiffs in this case were apprised by my letter that my clients had no intention to permanently restrain themselves from the use of the word, "Olympic" for any reason because they claimed a legal right to use it. That letter was written in February. We are here in August. There can be no surprise. There can be no claim of having been taken aback that is genuine on the face of this record where the plaintiffs are concerned. They say nothing happened between February and the present time. That is because they chose to forego the bringing of this litigation until this date, a few weeks prior to the commencement of the Gay Olympic Games. So the timing of the suit has been in the defendants' hands for all these months and the fact that they have chosen to abstain and to wait some six months from the time when they were apprised that the word "Olympic" would be used suggests that their claim of irreparable injury has to be weighed and measured by this court against the reality that if the injury is so irreparable, the defendants did nothing to repair it for a period of almost six months.

They claim a further injury at least by way of characterization, although once again there is no evidence of record, there is no affidavit of record that supports this. They make the argument that their good will has somehow been impaired or infringed by the activities of these defendants and they state, in the memorandum of points and authorities at page 14, that good will is inherently subjective. True it is, but the assumption of that argument is that the good will of the U.S. Olympic Committee has somehow been, or might

Ms. Dunlap *(cont.)*: somehow be, jeopardized by the activities of these defendants. Nothing in the record supports that.

The defendants make the argument—I am sorry—the plaintiffs make the argument at Page 2 of Mr. Walker's declaration that because there has been substantial media attention, the plaintiffs have somehow been especially harmed by the use of the word "Olympic" in context of the Gay Olympic Games. The greatest problem, the greatest trouble with that argument is that if this court were to take it to its logical conclusion, then any celebrated activity in which the media paid attention would, for that reason, be subject to restraint.

I submit to the court that the first amendment stands foursquare against the kind of reasoning about the media and the kind of inferential claim of harm that the plaintiffs here seek to advance.

I think that along with the fact the defendants have not demonstrated injury that is requisite to a showing required for purposes of any temporary relief is the fact that the plaintiffs will be injured if this court issues an injunction. Not only will they be injured in the practical sense of having to excise and remove this term from all of their materials and promotional and publication literature, but also and more profoundly, the defendants and every other individual who claims a non-commercial, non-trademark related right to use the term "Olympic", which we also submit is a generic work of long standing non-commercial history, the first amendment rights of all of those people will have been invaded, not simply by these plaintiffs' position, but by this court's making of an order based upon that position.

For that reason, we rely substantially not on the merits of the decision in the "STOP" case, but on the court's discussion there in dictum of the problems that would arise from an injunction aimed at the non-commercial and political and non-trade related use of a term.

Finally, your honor, I would make something, which I

Ms. Dunlap *(cont.)*: have to characterize as being in the way of an offer of proof. Obviously, the short notice in this case precludes me, even if the court were willing, from putting on witnesses or presenting affidavits.

I am informed by my client, and we will prove at whatever stage the court is able to hear the evidence, that there are other Olympics conducted widely across the United States by groups such as police organizations, the Armenian National Origin Group, Crab Cookers, Waiters, Diaperers and a whole variety of different people who set up athletic events and theatrical performances using the term "Olympic" who, in many instances, have received letters of so-called warning from Don Mitchell and others of the U.S. Olympic Committee, but who, in no instance, have ever been brought as parties defendant to litigation, and we submit in that regard, that as well as the first amendment defenses that we intend to prove, and to provide in response to this litigation, there is a very substantial equal protection question.

If the plaintiffs are permitted to proceed against a particular group for discriminatory reasons and to use the good offices of the Federal Court to enforce that discrimination, it is our position then that not only the first amendment rights of these plaintiffs and the public will be violated, but also that there is a significant equal protection guarantee question.

The final test for purposes of any temporary relief is where there is any harm to the public that arises from the making of a temporary restraining order or preliminary injunction, and I would submit that there are two distinct bases for a conclusion that there is harm to the public if the application for temporary restraining order were to be granted here.

First of all, as I earlier submitted, the plaintiffs' entire case is posited upon what we believe to be a misinterpretation of federal law and of the purposes of Congress in the enactment of the laws upon which plaintiffs rely.

Congress did not intend, and we believe the "STOP" case part establishes this, as well as some cases cited at footnote 22

Ms. Dunlap *(cont.)*: of page 1119 of that opinion. Congress did not intend, by the enactment of the laws upon which plaintiffs rely to reach out and protect and prevent every non-commercial political, social or other use of the term "Olympic". Had they done so, and this is the second ground for harm to the public, such an act on the part of Congress would indeed, and should indeed, undergo the most careful scrutiny in light of its profound effect upon first amendment rights.

For all of those reasons, Your Honor, we believe that the plaintiffs' application for a temporary restraining order ought to be denied by this court and that this court ought to in whatever way the court can, to set the matter of a motion for preliminary injunction for some time within the next several days or week or so so that the matter may be resolved in behalf of all the parties.

Does Your Honor have questions?

The Court: No.

Ms. Dunlap: Thank you.

Mr. Walker: Your Honor, the first point raised by Ms. Dunbar (sic) was that the statutes upon which we rely are not intended to prevent commercial—or excuse me—are intended to prevent commercial competition with the Olympic Games and because her client is a non-commercial corporation, the statutes do not apply.

Your Honor, I would like to direct your attention to the statutes themselves and to them which are quoted in our memorandum on Page 2. This is Section 380, Subsection A, and the Court will note that the statute provides that without the consent of United States Olympic Committee, any person who uses, for the purpose of trade to induce the sale of any goods or services or to promote any theatrical competition, athletic performance or competition, and that is exactly what this organization is planning to do and is doing. And it makes no difference that these defendants are not going to earn a profit from that activity.

Ms. Dunbar (sic) said that she was not relying on the holding of the "STOP" case and well she should not because

***Mr. Walker** (cont.):* that case provides her no comfort whatever. What the parties there, who were using "Olympic" in their names, were doing were to try to stop a state plan to convert the athletic or athletes' dormatories and housing facilities constructed for the late classic Olympics of a few years back, to have those facilities converted subsequent to the Olympics to a prison. These were people in the community and they didn't like the idea of having a prison in their area and so they formed an organization, "Stop the Olympic Prison". That is not the kind of use of "Olympic" in connection with an athletic competition or competition which is reached by section 380, and the court was very clear in a decision by Judge Canella (phonetic), that had the infringing party or allegedly infringing parties been conducting an activity of the kind the United States Olympic Committee engages in, namely, athletic performances and competitions, his ruling would have been quite different.

With regard to Ms. Dunbar's (sic) First Amendment claim, we think that's easily answered, Your Honor. In fact, we consigned it to a footnote in our memorandum.

It's quite clear that certain uses of "Olympic", for example in news stories, are not affected by Section 380, and we don't make any such claim.

Under the logic presented by Ms. Dunbar (sic), if the First Amendment foreclosed our action here, there would be no right of any copyright or trademark claim, but of course those are claims which are provided and the first amendment does not stand in the way at all of those claims.

And finally, let me address Ms. Dunbar's (sic) public interest argument. She claims that we are not going to suffer any harm and that her clients are going to suffer harm.

Your Honor, we are harmed. First because this is an activity which directly competes with the Olympic Games, an athletic competition and event. The fact that it is identified with homosexuals and the homosexual community makes that harm to us even graver.

In Mr. Miller's affidavit, he points out at the bottom of

***Mr. Walker** (cont.):* Page 3 that there is no restriction by the United States Olympic Committee or the International Olympic Committee against participation in the Olympic Games by homosexuals and he is confident that homosexuals have participated.

The U.S.O.C. is prevented by statute from discriminating on the basis of race, creed, color or what-have-you. The fact that the Olympics are open to everyone, gay or straight, suggests that having this group set up a series of athletic competitions and calling them "The Gay Olympics" suggests very strongly that they have to do it because the Olympics themselves are not available to gay people, but that clearly is not true. So we are harmed, our reputation is harmed by the mere use of this term, and we think that it should warrant a temporary injunction by Your Honor, a temporary restraining order.

The Court: All right. Is the matter submitted?

Ms. Dunlap: Yes, Your Honor.

Mr. Walker: I have the original proposed temporary restraining order. Should I submit it to the court, Your Honor?

The Court: I have one here.

Well, in reviewing this matter, this, of course, is a temporary restraining order. However, it seems to the court, in reviewing the criteria that one has to use in granting such a motion, one has to look at, one of the criteria is the likelihood of success on the merits and the statute, counsel, is clear. It says that the "Corporation may acquire all or all assets of the existing known as the—well, it goes on to say, in 380, "without the consent of the Corporation", which is the Olympic Committee, "any person who uses for the purpose of trade to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition", and it goes on four, "the words "Olympic", "Olympiad", "Citius Altius Fortius or any combination or simulation thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the corporation or any Olympic activity."

***The Court** (cont.):* And Subsection (C) below, skip a few of the other sections, it says:

> "The Corporation shall have exclusive right to use the name 'United States Olympic Committee': the symbol described in Subsection (a) (1) of this Section; the emblem described in Subsection (a) (2) of this Section; and the words 'Olympic', 'Olympiad', 'Citius Altius Fortius', or any combination thereof subject to the preexisting rights described in Subsection (a) of this Section."

So it would appear, from the statute of Congress, that Congress enacted, that the Olympic Committee possesses the exclusive right to use the word "Olympic" and "Olympiad" and the various other names, designations, symbols and insignia, "Olympic Games or combinations or assimulations thereof in the United States for trade or theatrical performances, etc., so it seems to me that this is quite clear now absent declaring this section unconstitutional, which I am not inclined to do at this particular juncture.

Ms. Dunlap: It is a little early for that.

The Court: I am going to have to grant the motion for preliminary injunction. However, I would like to give you as early a date as I can, but this is not my case, it's Judge Peckham's case and therefore, I—if you want, the earliest date I can give you is probably August 19th, and I would suggest there then, if this meets with everybody's approval, that—let's see, the Complaint and Memorandum of Points and Authorities and Supporting Affidavits be served no later than August 10th, which is tomorrow, and that any opposing papers to be served and filed by the defendants be no later than August 16th and then the hearing will be on August 19th at 9:30.

Ms. Dunlap: Your Honor, may I make one observation before you sign that order?

The Court: Okay.

Ms. Dunlap: Thank you kindly. Thank you for indulging me.

The section of the Statute that Your Honor just read was

***The Court** (cont.):* interpreted by Judge Canella in the "STOP" case and he said, and I quote, "Notwithstanding the broad wording of Subsection C, it cannot be interpreted to mean that only the defendants' Licensees may use the word 'Olympic', and the enumerated symbols for any purpose whatsoever."

Your Honor, for purposes of interpretation of the statute, we do rely on the holding in the "STOP" case as interpretive of the position which supports the defendants in this case. For that reason, a naked reading of the Statute cannot decide the question whether these plaintiffs are likely to succeed, whether there is a likelihood of success on the merits of their claim.

The Court: With all respect to my brother, if he were joined by two other judges and they were sitting on the appellate, Court of Appeals, I might be inclined to agree, but at this stage, I cannot.

Also, what do you suggest as a bond?

Mr. Walker: A thousand dollars, Your Honor.

Ms. Dunlap: Let me consult with my client about what the financial posture is of the non-profit organization.

Your Honor, I am informed by my client, Dr. Waddell, that at present, as of this date, San Francisco Arts and Athletics has expended approximately in the neighborhood of $60,000 to put on the Gay Olympic Games in late August. I think a bond of a thousand dollars may be cutting it a little close in terms of any remuneration that might eventually be due to the defendants for infringement of their rights.

The Court: Well, I think probably, I think a bond is sufficient even if your damages would be more than that: I am sure that the Olympic Committee is good for it. If not, they can pay it in tickets, huh, for the games.

So I will set the bond at a thousand dollars and sign this. The Court will execute the restraining order as submitted by Counsel.

Fine. Thank you, Counsel.

(Reporter's certificate omitted.)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Supplemental Declaration of Richard G. Kline in Support of Order to Show Cause Re Preliminary Injunction

RICHARD G. KLINE declares as follows:

1. In addition to serving as one of counsel for plaintiffs in this action, I am Counselor as well as trademark counsel for plaintiff United States Olympic Committee. If sworn as a witness, I could and would of my own personal knowledge competently testify under oath to the matters stated herein.

2. Pursuant to a policy that was established prior to enactment of the Amateur Sports Act of 1978, the United States Olympic Committee has continued to actively challenge registration of marks containing the word "OLYMPIC" or "OLYMPICS."

3. Among the judgments that have been entered sustaining these oppositions to registrations, the United States Olympic Committee succeeded not only in preventing registration of GOLDEN AGE OLYMPICS as a service mark for conducting athletic contests for senior citizens, but also obtained a written commitment to discontinue all use of "OLYMPICS" as a trade name or component of any mark. True copies of the judgment that was entered by the Trademark Trial and Appeal Board of the U.S. Patent and Trademark Office, the Settlement Agreement and the notification instituting Opposition No. 62,426 are appended hereto as Kline Supplemental Declaration Exhibit J.

4. In addition, the U.S. Olympic Committee has successfully enforced its rights to prevent the unauthorized use of "OLYMPIC" as exemplified by the following civil actions

that were brought after enactment of the Amateur Sports Act of 1978:

A. *United States Olympic Committee* v. *Olympic Trails Bus Company, Inc.*, Civil Action No. 80-2062 (D.C. Cir. 1980). A true copy of the Consent Judgment and Permanent Injunction against using or displaying "OLYMPIC" as a trademark, service mark or trade name is appended hereto as Kline Supplemental Exhibit K.

B. *National Amateur Sports Foundation* v. *United States Olympic Committee*, Civil Action No. 80-496 (D.C. Cir. 1980). A true copy of the Consent Decree prohibiting the use of "OLYMPIC" in connection with the solicitation of funds or obtaining contributions is appended hereto as Kline Supplement Declaration Exhibit L.

C. *United States Olympic Committee* v. *David Shoe Company, Inc., et al.*, Civil Action No. C-1-82-596 (S.D. Ohio 1982). A true copy of the Opinion and Order Granting Plantiffs' Motion For A Preliminary Injunction prohibiting use of "OLYMPIC" for the purpose of trade or for any other purpose under 36 U.S.C. § 380 is appended hereto as Kline Supplemental Declaration Exhibit M.

(Jurat omitted.)

(Exhibits omitted. Exhibits are in Record, Docket #11.)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Vaughn R. Walker in Support of Application for Preliminary Injunction

VAUGHN R. WALKER, declares as follows:

1. I am one of counsel for plaintiffs herein. If sworn as a witness I could and would under oath testify of my own personal knowledge to the matters stated herein.

2. On August 9, 1982, I appeared in this Court on behalf of plaintiffs. Before the hearing, a person who identified himself as a news reporter gave me a packet of materials which, he said, had been distributed to the media by the organizers of the so-called "Gay Olympic Games." Attached hereto as page one of Exhibit A is a true copy of the front of the packet; page two of Exhibit A is a copy of the inside cover of the packet. Exhibit B hereto are true and correct copies of the items in the packet.

(Jurat omitted.)

(Exhibits omitted. Exhibits are in Record, Docket #12.)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 5, above)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Affidavit of Ronald T. Rowan in Support of Request for Preliminary Injunction

Affidavit of Ronald T. Rowan

STATE OF COLORADO)

COUNTY OF EL PASO) ss.

RONALD T. ROWAN, being duly sworn, deposes and says:

1. I am General Counsel for the United States Olympic Committee and have served in that capacity since 1979. I have personal knowledge of the matters stated herein, could and would competently testify under oath thereto if called as a witness.

2. As General Counsel I am responsible for advising and assisting the Executive Director of the United States Olympic Committee ("USOC") with regard to general legal matters involving the USOC. I am also responsible for assisting the USOC Counselor in legal matters concerning the USOC . In this capacity I am responsible for coordinating the everyday activities of the USOC concerning designations and symbols protected under the Amateur Sports Act of 1978 and under trademark registrations. In this respect I notify those organizations, corporations and individuals throughout the United States, of whom we become aware, who use any Olympic terminology and symbols contrary to the protected interests of the USOC. I also follow-up on such notifications and take appropriate additional action as warranted. Such actions are performed at the direction of the Executive Director, and, where there is non-compliance with our requests, I confer with our Executive Director and/or

Counselor concerning what further action would be warranted.

3. The USOC pursues a policy of attempting to obtain compliance with its rights under the Amateur Sports Act of 1978 and enforcement of its registered marks. Each case is weighed on its individual facts and circumstances and the action taken depends on those facts and circumstances. The degree of action may depend on whether the infringement or misuse is of a commercial nature or an athletic competitive nature.

4. Since 1978 the USOC has become aware of a large number of instances where there has been an apparent infringement, misuse, or abuse of its rights under the Amateur Sports Act of 1978 or violation of its registered marks, and has taken action in all but a few of those situations. Of those situations, 15 have involved competitions of one form or another, and the USOC has received compliance in 9 of those. Five are still being actively pursued and one is in litigation.

5. In addition to contacts initiated by the USOC with regard to infringements of its rights under the Amateur Sports Act of 1978, many of the states in the United States cooperate with the USOC in refusing to allow corporations to register in their state if they bear Olympic terminology in their corporate name. The USOC uniformly opposes the registrations of any such names of which it becomes aware and does not grant permission for such use in corporate names.

6. The USOC actively pursues a policy of opposing registrations of any conflicting marks in the United States Patent and Trademark Office which involve the use of any Olympic designation. Since 1978 the USOC has initiated 22 oppositions challenging registration of various Olympic designations, of which, 9 judgments have been entered sustaining these oppositions by refusing registration of the contested mark, 16 proceedings are still awaiting disposition and one opposition was dismissed. During that period the

USOC has also petitioned to cancel one registration of conflicting marks, which proceeding resulted in the cancellation of the registered mark.

(Jurat omitted.)
(Certificate of service omitted.)

File Date: August 16, 1982

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-82-4183 RFP

Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction and in Support of Motion to Vacate T.R.O.

(Indexes omitted in printing.)

I. INTRODUCTION

Defendant San Francisco Arts & Athletics Inc. (below, "SFAA") is a California non-profit corporation. (Declaration of Dr. Thomas Waddell, below "Decl.T.Waddell", at para.1,p.1; Decl. M.Evans Ex's CC,DD). Defendant Dr. Thomas Waddell is one of the founders of this organization, and he is the Chairman and an originator of the Gay Games, to be held on August 28th-September 5th, 1982. (Decl.T.Waddell, at para.'s 1, 2 pp. 1-3, para. 5 p. 4).

This litigation concerns the legality of these defendants' use of the term "Olympic" to describe, promote and to sell items to pay the costs of, the Gay Games of 1982.

Through the labors of defendant Dr. Waddell and a number of other volunteers, and with community support and participation in and beyond San Francisco, California, defendant SFAA is staging a program of cultural and athletic events during August-September, 1982, which includes athletic performances and contests in a variety of sports to occur August 28, 1982 through September 5, 1982, at Kezar Stadium in San Francisco, which defendants and others have termed the "Gay Olympic Games of 1982". (Decl.T.Waddell, para. 2 p. 2; see also Exhibits H-L to Decl. T. Waddell).

The declared purposes of the Games includes "present[ing] to the world a serious sporting event from which more respect for gay people will grow", "balanc[ing] the onslaught of the Moral Majority's perspective", "emphasiz[ing] participation and cooperation...not for commercial value", and "[gay persons] seeking respect from others...", as well as related philosophical, aesthetic, educational, social, cultural and political purposes. (Decl.T.Waddell at Exhibits H-L thereof).

On August 9, 1982, plaintiffs International Olympic Committee (IOC) and United States Olympic Committee (USOC) filed suit against SFAA and Dr. Waddell, purporting to claim violations of the Amateur Sports Act of 1978, 36 U.S. Code sec. 371 et seq., the Trademark Act of 1946, 15 U.S. Code sections 1114, 1115, 1116 and 1125(a), the

International Convention for the Protection of Intellectual Property, 15 U.S. Code sec.1126 (h), California's anti-dilution law, Calif.Business & Professions Code sec. 14330, and contract law (Complaint filed 8/9/82). Plaintiffs USOC and IOC moved for a temporary restraining order, which was granted by the Honorable Samuel Conti, U.S. District Judge, on August 9, 1982. The t.r.o. by its terms prohibits defendants and all persons connected in any way with them from using the term "olympic" to sell items relative to the Gay Games, or "...in connection with any advertising, promotion, publicity, or production of any theatrical exhibition, athletic performance, competition or event." (T.R.O. para. ! p. 2 (8/9/82)).

II. THE TEMPORARY RESTRAINING ORDER WAS ERRONEOUSLY ISSUED, AND IT IS HURTING DEFENDANTS AND THE PUBLIC.

A. The Issuing Court Misinterpreted and Misapplied the Amateur Sports Act of 1978.

In issuing the t.r.o. in this action, Judge Conti expressly relied upon and accepted plaintiffs' claim that defendants SFAA and Dr. Waddell have violated the Amateur Sports Act of 1978, 36 U.S. Code section 380, by unauthorized use of the word "Olympic". (T.R.O. p.1 lines 30-31 (8/9/82); Transcript of Hearing, pp. (8/9/82)).[1] In that reliance and acceptance, the issuing Court misread and misapplied section 380 of that Act.

Section 380 of the Amateur Sports Act of 1978 empowers USOC to bring a civil action "for the remedies provided in the Trademark Act of 1946" against any person who:

> "[w]ithout the consent of the Corporation...uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic

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[1]The transcript of the hearing of August 9, 1982 has been ordered on an expedited basis; it will be presented to Court and counsel when it is ready.

performance, or competition

• • •

> ...the words "Olympic", Olympiad", "Citius Altius Fortius", *or any combination or simulation thereof tending to cause confusion, or to cause mistake to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity...*"
>
> 36 U.S. Code section 380 (a) (4) (emphasis added).

Section 380(c) of the Act declares that the Corporation (USOC) has the "exclusive right" to use, *inter alia*, the word "Olympic", subject to section 380(a).

Plaintiffs moved for a t.r.o. on the basis of an unverified complaint, see Rule 65(b) of the Federal Rules of Civil Procedure, and several affidavits/declarations, none of which contains a single factual allegation that defendants' staging and promotion of, and sales of items to cover the costs of, the "Gay Olympic Games of 1982", has involved any use of the term "Olympic", in conjunction with those activities, that tends to cause confusion, mistake, deception, or false suggestion of a relationship with the U.S. Olympic Corporation or any Olympic activity under the Corporation's aegis, as section 380(a)(4), above-quoted, expressly requires. The factual predicate for the argument of plaintiffs that SFAA and Dr. Waddell have violated 36 U.S. Code section 380 is flatly and fatally missing from all of plaintiffs' filings to the Court.

The legislative history of the sections of the Amateur Sports Act of 1978 upon which plaintiffs seek to rely plainly establish that those sections were intended by Congress to enable USOC "...to protect certain symbols, emblems, trademarks, tradenames and words by civil action *pursuant to the Trademark Act of 1946*, House Rep't.No.95-1627, U.S. Code Cong.&Admin. News pp.7483, 7488 (1978) (emphasis added). The pre-existing criminal penalty for unauthorized use of those symbols, marks and names in

infringing ways was found to be unworkable due to the insuperable burden of proving criminal intent. *Id.* at p. 7488. In a letter from the Patent and Trademark Office of the U.S. Department of Commerce to the House committee responsible for the bill that became the Amateur Sports Act of 1978, the Commissioner of Patents and Trademarks stated in relevant part:

> "[36 U.S.Code sec. 380] carries forward some prohibitions from the existing statute enacted in 1950 and adds some new prohibitions, e.g. *words tending to cause confusion, to cause mistake, or to deceive with respect to the Corporation or any Olympic activity.*"
>
> Id. at p. 7496. (emphasis added)

The unmistakable and specific purpose of 36 U.S. Code section 380 was and is to enable USOC to bring civil actions to prevent and remedy unauthorized uses of its distinctive symbols, trademarks, signs and symbols, and words, in trade, for sales of goods and services, and to promote certain events, in those instances where a false appearance or representation, or a confusion, mistake or deception, would tend to result from such uses as between the trader, seller, promoter and/or its goods, services or events, on the one hand, and the USOC and/or any Olympic activity related to USOC on the other hand. The legislative history of this section permits no other gloss on the will of Congress in enacting section 380; yet plaintiffs at bar have been urged a reading of section 380 that altogether eliminates the limiting and focusing language chosen by Congress to express that specific legislative will.

In the case at bar, plaintiffs have failed even to *plead* facts sufficient to constitute a cause of action against SFAA and Dr. Waddell pursuant to 36 U.S. Code section 380, much less to make the factual showing that would be necessary to support plaintiffs' claimed entitlement to preliminary equitable relief. Plaintiffs' factual showing as to violation by defendants of section 380 is not merely deficient; it is absent.

Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, a t.r.o. may be granted "...only if...it clearly appears from specific facts shown by affidavit or by the verified complaint that *immediate and irreparable injury, loss or damage will result to the applicant...*" (emphasis added). No such showing was made by plaintiffs at bar, because plaintiffs' entire claim of injury based on section 380 depended upon a showing that they never made, to wit., that the "Gay Olympic Games of 1982" were being promoted, or items sold in connection with said Games, in a manner using the word "olympic" in combination with the Gay Games that tends to confuse, cause mistake, deceive or falsely suggest a relationship of the Gay Games and/or their promoters with the USOC or any Olympic activity.

Assuming *arguendo* that the procedurally serious flaw of unverified allegations in plaintiffs' complaint could be set aside, the allegations in the said complaint that are referred to and set forth in plaintiffs' purported claim for relief pursuant to section 380 of the Amateur Sports Act of 1978 (see Complaint at para's 1-9, 11-13, 17-20) do not establish any of the statutory elements of *actionable* usage that are contained in section 380 (a) (3) and/or (4). Each of those allegations of plaintiffs' pleading must be separately reviewed, in order to recognize the total insufficiency of the pleading to state a cause of action pursuant to section 380.

The carrying of a flaming torch by runners across the United States, as alleged in paragraph 6 of the complaint, is nowhere prohibited by section 380.[2] The defendants readily admit that they have used the combination of "Gay Olympic Games" to promote, and to sell items to cover the costs of, the planned events of August 28, 1982-September 5, 1982 in Kezar Stadium. (Decl.T.Waddell, para's 2, 3, 5, 8, 9, pp.2-6,

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[2]Assuming *arguendo* that a Congressional prohibition against the running of a flaming torch across the continental U.S.A. could escape invalidity under the First Amendment guarantee of symbolic speech, Congress did not prohibit or even mention such activity in considering and enacting section 380.

10-11; and see Exhibits H-L to Decl. T. Waddell.)

However, defendants have not used any symbol, emblem, trademark, tradename or insignia of plaintiffs in said promotion and sales, plaintiffs' intimations to the contrary notwithstanding. (Decl. T. Waddell, para. 8 p. 11, and Exhibits H-Y thereof).

Plaintiffs assert in their complaint that they have lost "reputation and goodwill due to mistaken affiliation or association of defendants with the Olympic Games or deception engendered by defendants' continued misuse of 'Olympic' and plaintiffs, other exclusive names, marks, designations, symbols, emblems and insignia". (Complaint, para.11 pp.4-5). But nowhere in plaintiffs' complaint or in any of their declarations or affidavits is there any *factual* allegation in any way supporting the bald conclusions about "mistake", "deception" and the like that plaintiffs offer.

Nor can the elements of false representation, confusion, mistake, deception or false suggestion, as required to be proved by section 380, be presumed in the case at bar. The combination of the words in "Gay Olympic Games" used by defendants in all instances have included the term "Gay". These combinations of words have not been used by defendants in conjunction with any trademark, tradename, sign, symbol or insignia associated with or owned by plaintiffs, nor have the words "Gay Olympic Games" been used in conjunction with the specific symbols and emblems defined in 36 U.S. Code section 380 (a)(1) and (2). Thus it is sheerly defendants' use of the word "Olympic", always in union with and to describe the Gay Games, that plaintiffs attack in the case at bar.

As discussed above, in an action pursuant to section 380 of the Amateur Sports Act of 1978, the word "Olympic", when used as in the case at bar in combination with other words, must be shown to tend to cause confusion, mistake, to deceive or to falsely suggest a connection with plaintiffs and/or their Olympic activities. Those requirements and limits upon section 380 interposed by Congress, which refer to and

parallel provisions of federal trademark protection under the Lanham Act make particularly sound public policy sense in the context of the word "Olympic".

USOC did not register the word "Olympic" as a service mark until 1965, and it did not register the word "Olympic" as a trade mark until 1973. (See Decl.R.Kline Supp. Mo.T.R.O. etc. at Exhibit I thereof). By 1965 and 1973, there were apparently thousands of pre-existing and simultaneous uses of the term "Olympic" in and out of U.S. commerce, in that as of the present there are apparently thousands of such uses of "Olympic" to trade, sell and promote a variety of services and programs throughout the world. (Declaration of Mary C. Dunlap in Opposition to Prelim. Inj. etc. at para. 4, p. 2 and Exhibit B of Decl.M. Dunlap).

If Congress had eliminated the terms "...tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity" from section 380(a)(4), potentially thousands of co-existent and subsequent uses of the term "Olympic" in whatever combinations would be rendered actionable by the enactment of section 380. Plaintiffs would have an apparent right of civil action against virtually innumerable businesses, enterprises, programs and activities across the nation (and in international commerce) that use, have used, or will use the word "olympic" in trade, sales and promotions on or after September 21, 1950. Section 380(a)(4). If Congress had omitted the limiting terms quoted above in section 380(a)(4), the considerable interests of literally thousands of persons in both commercial and noncommercial uses of the word "olympic", distinct from plaintiffs' uses, would have been needless (and perhaps unconstitutionally[3]) disrupted, and made vulnerable to legal doubt and challenge.

In the exact language of section 380(a)(4), it is obvious that Congress determined not to permit every user of the term "olympic" to be vulnerable to such legal doubt and challenge.

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[3]See section II. C. of this memorandum, *infra*.

To be actionable under section 380, an unauthorized use of "olympic" in combination with other terms in trade, sale or specified promotional activity must be proved by plaintiffs to tend to cause confusion, mistake, deception or false suggestion.

To *presume* any of those crucial statutory elements (ie, confusion, mistake, deception, false suggestion) as to the "Gay Olympic Games" at bar, as plaintiffs apparently would have this Court do, would be tantamount to presuming such elements as against every other trader, seller or promoter, whether commercial or otherwise, who uses, has used or might use the term "Olympic" in conjunction with activities as diverse as auto repairs, selling shoes and cookies, and promotion of athletic and dramatic events and entertainments among police, firefighters, seniors, crab-cookers, chili-makers, diaperers and Armenians. (Decl. T. Waddell, para. 2 p.2 and Exhibits BB, EE and App. 1 thereof.)

Obviously, such a presumption is not simply contrary to the letter and spirit of section 380; it would establish the unwarranted and unacceptable legal reality that by such a presumption plaintiffs would gain causes of action against literally thousands of users of the term "Olympic" in trade, sales and promotions across the U.S. and internationally, when Congress neither intended nor created such a result.

In summary, because plaintiffs' unverified complaint and affidavits/declarations do not contain a single fact showing or even suggesting that defendants' use of the phrase "Gay Olympic Games" has violated section 380(a)(3) or (4), and because it would be legally improper and unsound in policy to presume such facts, plaintiffs' motion for t.r.o. based upon Section 380 of the Amateur Sports Act of 1978 was factually inadequate and legally erroneous. The t.r.o. issued on those inadequate and erroneous bases should be dissolved immediately.

B. The Issuing Court Did Not Take the S.T.O.P. Opinion Properly Into Account.

Since enactment of 36 U.S. Code section 380, there has

been only one occasion upon which judicial interpretation of that legislation has been necessitated. In the case of *Stop The Olympic Prison v. U.S. Olympic Committee*, 489 F.Supp. 1112 (S.D. N.Y. 1980), U.S. District Judge Cannella issued a declaratory judgment in favor of plaintiff S.T.O.P., determining that its posters containing the word "Olympic" as well as pictures of five interlocking rings and a hand-held torch, some of which posters were sold directly by S.T.O.P., a non-profit corporation, for money in the nature of "contributions for its cause", 489 F.Supp. at 1114, did not violate 36 U.S. Code section 380 nor infringe or dilute any of USOC's trademarks. *Id.* 489 F.Supp. at 1126, and see Appendix A thereof. Judge Cannella did not decide plaintiffs' claim of a right based upon the First Amendment to distribute the poster; instead, Judge Cannella disposed of the parties' contentions entirely upon statutory grounds.

In the course of that statutory disposition, Judge Cannella had occasion to interpret Congress' intent in enacting section 380, observing in pertinent part that:

> "Notwithstanding the broad wording of subsection(c) it cannot be interpreted to mean that only the defendant (USOC) and its licensees may use the word 'olympic' and the enumerated symbols for any purpose whatsoever...
>
> * * *
>
> it appears that Congress' objective has been to prevent the deceptive or confusing use of these corporations' mottoes, emblems and the like by unauthorized persons...
>
> * * *
>
> [S]ubsection (c) appears to have been designed to prevent all persons other than the U.S.O.C. from registering the Olympic words and symbols as trade marks or service marks in connection with any types of goods or services whatsoever, rather than as a blanket prohibition of all uses whether commercial or not. What little legislative history there is about this subsection

supports this conclusion."

Id. 489 F.Supp. at 1119-1120.

In the case at bar, as in *S.T.O.P., supra,* the unconsented-to users of the word "olympic" are a non-profit organization and its supporters and participants, who are engaged in volunteer efforts conjoined with an original program distinct from USOC and The Olympic Games. Here, as in *S.T.O.P.*, the unconsented-to users of the word "Olympic" are using the term in conjunction with sponsorship, advancement and advocacy of a cause; here the cause is freedom, dignity and respect for all persons without regard to sexual orientation, throughout the world. (Decl.T. Wadell, para. 2 p.2, p.3; para. 6,p.7; para.6, p.8, para. 7 p.9; Decl.A.Rosenfeld, para.2, pp.1-2; Decl.Z.Artman para. 2 p.2; Decl.D.Loberg, para. 2,p.1; and see other declarations).

It is not disputed by defendants that, unlike plaintiff S.T.O.P., defendants at bar have used the phrase "Gay Olympic Games" to promote an athletic performance, and that, to support defendants' non-profit activities and operations in relation to that performance, defendants have sold goods containing the words "Gay Olympic Games". (Decl.T.Waddell, para's 2,3,5,8,9, pp.2-6, 10-11; Decl.A.Rosenfeld, para. 5, p.2; and see Decl. T.Waddell at Exhibits H-Y thereof.)

However, it is strongly emphasized that these sales and promotions are not *per se* prohibited by section 380 (see Section II.A of this memorandum, *supra*). Judge Cannella in *S.T.O.P.* did not have need or occasion to interpret the meaning of the limiting phrases in section 380 (a)(4), because he found S.T.O.P.'s activities not to fall within the purposes or preliminary tests for application of section 380 (sales, etc.). Even so, the District Court's reading of the purposes of section 380 in the *S.T.O.P.* opinion has application to the case at bar, insofar as the cases are similar, as discussed above. Therefore, defendants respectfully submit that the issuing Court's failure to consider the *S.T.O.P.* opinion in granting the t.r.o. was erroneous.

C. The Issuing Court Did Not Correctly Consider The Constitutional Problems Raised By This Suit And By Its Issuance of the T.R.O.

Plaintiffs in this action have sought to sweep aside the potentially significant constitutional issues raised by their suit, by declaring that they are not obligated to respect U.S. Constitutional guarantees because they claim that they are not engaged in "state action", and by further asserting that "...it is clear that the district court may act to enjoin defendants' *commercial* speech". (Pltfs.' Memo. Supp.T.R.O.etc. pp.12-13) (emphasis in original). That abrupt and conclusory treatment of the constitutional questions raised in this action is inadequate, in defendants' view.

Defendants in this action contend that because plaintiff U.S. Olympic Committee is performing a public function specifically delegated and defined by the government, USOC should be held to be obligated to respect the federal constitutional guarantees of free speech, free association and equal protection of the laws. *See, e.g., Marsh v. Alabama*, 326 U.S. 501 (1946) (Holding that "company town" may not invoke state trespass laws to remove Jehovah's Witnesses from town's streets); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726 (1961) (Holding "state action" shown where state agency owned building in which private restaurant that discriminated by race was located). The extensive and elaborate nature of plaintiff USOC's authority to govern, and to perform public functions associated with the The Olympic Games, and the explicit creation of this quasigovernmental authority by Congress, as well as USOC's use of public facilities and resources in The Olympic Games, make USOC's position that it is not engaged in "state action" very dubious.

But the question of plaintiffs' own "state action" need not (and factually should not) be resolved at the instant stage of these proceedings. The fact that plaintiffs have sought and gained a t.r.o. and are seeking a preliminary injunction, to

restrain non-profit political, educational and cultural use of the term "olympic", clearly establishes the requisite state action for purposes of considering the First Amendment and equal protection-based implications of such court orders, given that such orders are themselves undeniably a form of governmental action by the courts. *Shelly v. Kraemer*, 334 U.S. 1 (1948); *New York Times v. Sullivan*, 376 U.S. 254, 256 (1964).

The cases cited by plaintiffs for the proposition that the district court may act to enjoin *commercial* speech did not address nor even involve potential First Amendment claims of a nonprofit organization that is utilizing a descriptive term, "olympic", to advance noncommercial causes. In *Dallas Cowboys Cheerleaders Inc. v. Pussycat Cinema Ltd.*, 604 F.2d 200 (2d Cir. 1979), upon which plaintiffs seek to rely at bar, defendant was a profit making company that made a movie, "Debbie Does Dallas", in which trademarks of the plaintiff corporation appeared and were used in ways that impaired the value of those marks. The *Pussycat* case did not raise, and it cannot possibly be held to resolve, the distinct question of the permissible extent of limitation by a trademark upon a generic word upon the First Amendment rights of speech and association of a nonprofit organization and those associated with it to use the trademarked word to further educational, political and cultural goals.

In the *Fur Information Case*, cited with approval in *S.T.O.P. v. U S Olympic Committee*, *supra*, 489 F.Supp. at 1125, the District Court observed in pertinent part:

> "While Congress may limit (first amendment) rights to prevent fraud, copyright infringement or palming off, *such limitation must be drawn narrowly, so as to meet the perceived evil, without unnecessary impingement on the right of free speech.*

364 F.Supp. 16, 22 (S.D.N.Y. 1973); aff'd. on other grounds, 501 F.2d 1048 (2d Cir. 1974); cert. denied, 419 U.S. 1022 (1974)(emphasis added).

Defendants in this action contend that Congress did limit

section 380, to protect use of the word "Olympic" in contexts such as the "Gay Olympic Games" here presented. Defendants further contend that the abridgement of First Amendment rights of free speech and association occasioned by the t.r.o. and threatened by further injunctive relief at bar derives not from Congress, but from plaintiffs' own erroneous and overbroad interpretation of section 380, which wrenches the protection of plaintiffs' uses of "Olympic" vis à vis commercial competitors whose uses tend to confuse, mislead and the like out of the built-in limits of section 380 in an effort to apply that statute to defendants' constitutionally protected uses.

But because of the issuing Court's mistaken adoption of plaintiff's erroneous interpretation of section 380, the t.r.o. issued at bar has accomplished a classic prior restraint, consisting of governmental censorship of use of the word "Olympic" by "defendants their employees, agents, officers, attorneys and representatives [and] all persons participating with or acting in concert with [defendants] "*inter alia*," in connection with any advertising, promotion, publicity, or production of any theatrical exhibition, athletic performance, competition or event". (T.R.O. p. 2 lines 6-19 (8/9/82)). Defendants submit that this prior restraint by court order upon their uses of the word "olympic" in relation to the Gay Games has accomplished precisely the harms that the doctrine against prior restraints seeks to prevent, *to wit.*, inhibiting or prohibiting particular speech and/or association via a governmental order that threatens punishment of that speech/association. L. Tribe, *American Constitutional Law* 624-628, 655-656 (Foundation Press, N.Y.; 1978).

Professor Tribe has pointed out that the distinction between "talk for profit, and talk for other purposes" can be very troublesome. *Id.* at 656. But, in the case at bar, this distinction is not troublesome, in that defendants are a nonprofit corporation and a volunteer, whose use of the term "Olympic" is in immediate and inseparable conjunction with the promotion of a publicly supported event/activity, and is

in intentional ideological conjunction with the advancement of freedom and equality for an oppressed group, ie. gay persons. It is noted that speech and association in behalf of this cause has repeatedly been afforded protection by decisions of courts. *See, e.g., Lesbian/Gay Freedom Day Committee Inc. et al. v. Immigration and Naturalization Service et al.*, C-81-2522 RPA (6/17/82) (appeal pending), — F.Supp.—; *Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation*, 417 F.Supp. 632 (D.R.I. 1976); *Alaska Gay Coalition v. Sullivan*, 578 P.2d 951 (Alas. 1978); see generally, R. Rivera, "Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States", 30 *Hast. L.J.* 799, 934 (March 1979). Moreover, First Amendment protection of even unambiguously commercial speech may have to be afforded, where governmental intrusion upon such speech restricts the free flow of truthful information", *Linmark Associates v. Township of Willingboro*, 97 S.Ct. 1614, 1620 (1977), or inhibits speech that would provice greater freedom of choice to those members of the public who need it most due to misfortune or discrimination, *cf. Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 763 (1976).

Defendants in this action also contend that plaintiffs' selection of them as a litigative target represents discrimination against gay and lesbian persons, given that USOC has yet to sue to enjoin, for examples, the Police Olympics, the Senior Olympics, the Armenian Olympics or any other similar group from using the term "olympic" to promote, or make sales in conjunction with such events. (Decl. T. Waddell).

Defendants further contend that the use of federal injunctive power to vindicate plaintiffs' discriminatory choice wholly violates the equal protection guarantee, as it is arbitrary and invidious vis à vis gay and lesbian persons, and as such use of the courts—via injunctive relief—represents the enforcement of law with an unequal hand and an evil eye,

against a human sub-population that is already oppressed and stigmatized by homophobia, stereotypes and bigotry. *Yick Wo v. Hopkins*, 118 U.S. 358 (1886); *Shelley v. Kraemer*, *supra*; *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*, 24 C.3d 458, 488, 595 P.2d 592, 610-11, 156 Cal.Rptr. 14, 32-33 (1979) (recognition of discrimination against gay persons as actionable in statutory context involving quasigovernmental entity).

To find reason in the above constitutional arguments to dissolve the t.r.o. and to deny preliminary injunctive relief in this action this Court need not conclude that any of defendants' constitutional claims and defenses *will* succeed upon its merits in this action. Rather, defendants submit, at the present procedural stage, this Court is obliged only to consider the severe and irreparable harm to defendants and to the public if any of these constitutional claims is upheld, and to weigh the strength of these claims against plaintiffs' purported legal claims. Plainly, in granting the t.r.o. against use of the word "olympic" in this action, the issuing Court did not fulfill that obligation. It is simply this Court's repair of that harmful omission, and not a full-blown inquiry in to the potential unconstitutionality of section 380, that defendants seek to accomplish by this presentation of constitutional issues, at this stage.

D. Plaintiffs USOC and IOC Have Not Made Any Factual Showing Of Injury, Much Less Of Irreparable Injury, That Has Been Or Could Be Caused By Defendants' Use Of the Word "Olympic" In Conjunction With The Gay Games.

Injunctive relief as empowered by the Trademark Act of 1946, to which the Amateur Sports Act of 1978 in section 380 specifically refers, is only available upon a showing of *infringement*. Plaintiffs have offered not one iota of proof of such an infringement by defendants, whether as defined by 15 U.S. Code sections 1114 and 1115 or as defined by 36 U.S. Code section 380(a)(1)-(4). If a likelihood of proving such an infringement is not shown, preliminary injunctive relief may

not be issued, as a matter of the very statutes to which plaintiffs point and the tests for such preliminary relief.

Defendants assume *arguendo* that if plaintiff had shown facts to this Court that supported a finding of a likelihood that defendants would be proved to have infringed plaintiff's trademark as to "Olympic", that at least a part of the factual predicate for a determination that plaintiffs would have need of preliminary injunctive relief to prevent irreparable injury to them would be presented, although in considering the preliminary injunction application the injury to *defendants* would still have to be considered and weighed. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 526 F.2d 86 (9th Cir. 1975). But plaintiffs at bar simply have not made the prerequisite showing as to a likely violation of law, nor have plaintiffs shown any other facts that support the conclusion that plaintiffs IOC and USOC have been injured or might be injured by defendants' use of the word "Olympic" in relation to the Gay Games.

Plaintiffs' memorandum in support of t.r.o. etc. argues without any factual support for the first premise that dilution of the distinctive quality of the term "Olympic" would cause injury to plaintiffs' goodwill conjoined with that term. (Pltfs. Memo.T.R.O. etc. p.14, lines 20-24). But nowhere do plaintiffs show that defendants' use of "Olympic" has caused or even is likely to cause dilution. Like plaintiffs' claim that defendants have violated 36 U.S. Code section 380, apparently plaintiffs would have this Court *presume* "irreparable injury" to plaintiffs. Rule 65(b) of the Federal Rules of Civil Procedure and the precedents of this Circuit governing issuance of preliminary injunctions preclude such a presumption of "irreparable injury". So do the terms of the federal statutes upon which plaintiffs rely. 15 U.S. Code sections 1114, 1115; 36 U Code section 380; *cf. S.T.O.P.* v. *USOC, supra*, 489 F.Supp. at 1121-1123. So also does the California anti-dilution statute, which requires a showing of "[l]ikelihood of injury to business reputation or of dilution of the distinctive quality of a mark . . . [as a] ground for injunctive

relief." California Business & Professions Code section 14330.

As in the instance of the use of "Olympic" in the *S.T.O.P.* case, *supra*, plaintiffs' claims of disparagement and dilution should fail at bar, because plaintiffs here have not shown any facts establishing even a likelihood that the defendants' use of the word "Olympic" in conjunction with their staging, promotion, and sales to pay for, the Gay Games will be found to be false, misleading, injurious to plaintiffs' business reputation or diluting of the distinctive quality of plaintiffs' trademarks as to "Olympic" or otherwise. *Id.* 489 F.Supp. at 1124-1125. Nothing in relevant statutes or case law equips plaintiffs' dilution claim with a presumption that *any* use of "Olympic" other than plaintiffs' own dilutes the distinctive quality of the trademarks. Other realities outside law would also appear to rebut such a presumption, in the case at bar, if law were to provide it. There are associations with "*Gay* Olympic Games" that distinguish defendants' program and materials from any other "Olympic" events or paraphernalia, because of the distinctive nature of the term "gay" and the original format, structure and logos of the "Gay Olympic Games". The public also is experienced in distinguishing The Olympic Games, and the products associated with USOC and The Olympic Games, from apparently thousands of other uses of the term "Olympic" in trade, sales and promotions of a variety of events and contests, including athletic competitions. (Decl. M.Dunlap para. 4 p. 2 and Exhibit B thereof; Decl.T.Waddell, p.2 para. 2 and Exhibits BB and EE and Appendix 1 thereof.)

For this Court to presume, contrary to the separate distinctiveness of the "Gay Olympic Games" and contrary to the wide public familiarity of uses of "Olympic" not associated with USOC and the Olympics, that there is dilution merely by defendants' use of the term "Olympic" would amount to a presumption that those myriad and widespread other uses of "Olympic" in trade, sales and promotions of events as diverse as athletic contests among

police, seniors, or Armenians, also presumptively dilute the distinctive quality of The Olympic Games' invocation of the word "Olympic". In summary, plaintiffs have simply failed to present facts that warrant the conclusion that use of the word "Olympic" in the context of the Gay Olympic Games has infringed upon, disparaged, or diluted their trademark upon "Olympic". Without such a showing, the plaintiffs' claims of injury are hollow, and the proposition that plaintiffs have been irreparably injured by the defendants' use of "Olympic" is factually and legally insupportable.

E. The Injury Being Suffered By Defendants and By The Public Is Severe, Immediate And Not Compensable By Money Damages.

The extensive injuries caused to and suffered by defendants and the other persons governed by the t.r.o. in this action are documented in the declarations that are submitted with this memorandum. (See Decl.M.Dunlap para's 2-3 and Exhibit A thereof; Decl. T.Waddell para's 7-9, pp. 9-12; Decl.M.Evans para's 3-5, pp.1-2; Decl. A.Rosenfeld, para's 2-5, pp.1-2; Decl. Z.Artman, para's 2-4 pp.1-3; and see other declarations of SFAA volunteers submitted herewith concerning the massive personal and political effects of the temporary restraining order in this action).

Those injuries, which are not generally compensable by money damages, include great and special burdens upon all persons who are working on the Gay Games, sadness, humiliation and distress associated with governmentally imposed prohibition, punishable by contempt, of the use of the word "Olympic" in association with the Gay Games, extreme disruption of and interference with the work of the organization and persons who are staging the Gay Games, direct interference with the educational, political, philosophical and cultural goals of those working in this non-profit enterprise to advance the causes of freedom, dignity, self-worth and equal opportunity of gay and lesbian persons in and beyond the USA, insult and hurt at being singled out for litigative attack while other "Olympic" events have been

conducted with knowledge and without restraint by USOC, and insecurity concerning personal, human and legal rights, as well as an obvious and substantial inhibition upon the ability of those working on the Gay Games to promote, to sell items to cover the costs of, and to talk about those Gay Games.

The injury to the public by means of the t.r.o. is no less real and substantial, nor is it any more compensable by money damages. This injury includes violation of the public's interest in fair, even-handed and accurate interpretation of federal laws such as the Amateur Sports Act of 1978, and apparent violations of constitutional guarantees of free speech and association and of the equal protection of the laws, as well as censorship deriving from the prior restraint of the t.r.o. (Declaration M. Dunlap Opp. Mo. Preliminary Injunction, etc., attached, pp.1-2 & Ex.A). Surely the public suffers most from the erroneous applications of federal law that have been crystallized in the t.r.o. issued in this action.

Plaintiffs argue that defendants SFAA and Dr. Waddell are not injured by the t.r.o. because they themselves used the term "Athletic" in lieu of the term "Olympic" for a period of time. (Memo.Supp.Mo.T.R.O. etc. p. 15 (8/9/82)). That argument rips the defendants' temporary non-use of the term "Olympic" wholly out of its factual context, as plaintiffs know; it was for the limited purpose of trying to afford a short grace period while trying to resolve this controversy amicably, in January and early February, 1982, that Dr.Waddell and others briefly forewent use of the term "Olympic". (Decl.T.Waddell pp.5-7 and Exhibits A-E thereof.)

Dr. Waddell's letter to Colonel Miller of January 18, 1982, which was written to offer such a temporary grace period while defendants found out about their legal rights and duties and tried to resolve this matter, was followed *eight (8) days afterward*, on January 26, 1982, with a letter by Dr. Waddell to Colonel Mill and USOC asserting defendants' rights and interests in continuing to use "Olympic", and by a letter from

defendants' attorney on February 12, 1982, which declared and informed plaintiffs' attorney Mr. Kline in relevant part:

> "My client and its representatives, officers and others concerned do not intend to abandon their rights to use the term 'Olympic'",

and which letter from defendants' attorney went on to refer to defendants' then-existing materials containing the word "olympic" offering to asterisk these materials and to label them "not associated with the U.S. Olympic Committee", *solely* as an accommodation to plaintiffs. (See Exhibits A and C to Decl.R. Kline Supp.Mo.T.R.O. etc.) The accommodation offered was rejected by USOC's attorney. (See Exhibit D to Decl.R.Kline).

Plaintiffs' contention that they were unaware of defendants' use of "Olympic" from February through May, 1982, is incredible on the face of it. Defendants plainly informed USOC of their use and intention to continue to use "Olympic" (with or without the asterisk) as of defendants' attorney's letter to Mr. Kline of February 12, 1982, and defendants' use of "Olympic" has been open from that time until the t r.o. was issued on August 9, 1982. Colonel Miller attests that he "did instruct members of the USOC staff to keep their eyes open for any resumed use of 'Olympic'" by SFAA, as of about February 1982. (Aff. D.Miller Supp.Mo.T.R.O. etc. pp. 4-5 para. 8). David Preston, press liaison for USOC, was located in San Francisco through at least March 1982. (Aff. D. Preston p. 1 (8/9/82)). The assertion of plaintiffs that they did not know, and the argument that they should not or could not know, of defendants' use of "Olympic" until June 1982 is thus undermined by plaintiffs' own affidavits.

In any event, the affidavits and declarations of plaintiffs unambiguously establish that plaintiffs were aware of defendants' use of "Olympic" as of early June 1982. (Aff. D.Miller and Aff.D.Preston Supp.Mo.T.R.O. etc.) *Suit was filed by plaintiffs two (2) months later.* In terms of the injuries to defendants and the public caused by the t.r.o., it is obvious that those injuries are being inflicted at the time

likeliest to maximize them, on the eve of the Games on August 28, 1982-September 5, 1982. Nor can these injuries accurately or fairly be trivialized by plaintiffs' carefully stripped reference to the brief period in early 1982 during which defendants forewent use of "Olympic".

F. The T.R.O. Must be Dissolved Immediately.

The t.r.o. issued on August 9, 1982 was issued with no factual foundation for plaintiffs' claims, in contradiction of the terms and legislative history of the Amateur Sports Act of 1978 and other statutes pointed to by plaintiffs, in disharmony with the sole precedent interpreting the Amateur Sports Act of 1978, in disregard of the constitutional problems created by plaintiffs' erroneous interpretation of section 380 of the Amateur Sports Act and in disregard of the apparent violations of defendants' and the public's First Amendment right to be free of prior restraints upon protected speech and orders that chill protected associations, and in spite of a complete lack of factual showing of any injury to plaintiffs, in the face of immediate, severe and non-compensable injuries to defendants and to the public interest. For those reasons, defendants move this Court to dissolve the t.r.o. immediately in this action.

III. PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED.

A. Plaintiffs' Motion For Preliminary Injunctive Relief Fails to Meet The Legal Tests For Such Relief.

In Section II. of this memorandum, *supra,* defendants have reviewed certain massive factual and legal deficiencies in plaintiffs' moving papers in support of t.r.o. For purposes of considering plaintiffs' motion for preliminary injunction, certain other significant deficiencies appear, and certain defenses also must be considered, which render plaintiffs' motion for preliminary injunction defective, and which in combination with the other deficiencies already reviewed should result in the denial of plaintiffs' motion for prelimi-

nary injunction. These additional deficiencies and potential defenses are briefly outlined in this section.

Plaintiffs' claims of infringement and dilution are not only factually unjustified and legally unsupported (compare allegations of plaintiffs' complaint in First, Third, Fourth, Fifth and Seventh Claims for Relief, pp.3-5, 6-10, 11 with the terms and tests of the statutes invoked); those claims are also subject to strong defenses by defendants. Defendants claim that plaintiffs are guilty of laches, in part deriving from the fact, admitted by plaintiffs, that plaintiffs did not bring this suit until at least two (2) months after being informed of defendants' continuing use of "Olympic", and in part deriving from the fact that plaintiffs have been aware that defendants claimed the right to use "Olympic" as of late January 1982.[4] *See, e.g. Saratoga Vichy Springs Co.Inc. v. Lehman,* 491 F.Supp. 141 (S.D. N.Y. 1979), aff'd. 625 F.2d 1037 (2d Cir. 1980); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 293 F.Supp. 892 (D.N.Y. 1968) (balancing of equities required as to laches defense). Defendants also claim that the word "Olympic" has been used by defendants in a manner that is fully defensible under the Trademark Act of 1946, "in good faith only to describe to users the goods or services of such party", 15 U.S. Code section 1115(b)(4). *See, e.g., Abercrombie & Fitch Co. v. Hunting World Inc.,* 537 F.2d 4 (2nd Cir. 1976) (where term is not used as trademark, but for description, there is no infringement even as to an otherwise incontestable trademark); *Gracious Lady Service Inc. v. Welcome Wagon International Inc.,* 295 F.Supp. 1373 (D.Pa. 1969) (defendants' use of phrase "gracious ladies" in radio ad to describe its services held not likely to cause confusion, mistake or to deceive as to plaintiffs' similar business; Held: plaintiff not entitled to injunction); *Soweco*

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[4]Defendants also contend that USOC's not taking of any legal action to restrain any of the numerous other "olympic" uses documented by defendants supports the laches defense at bar. *Cf. Saxlehner v. Eisner & Mendelson Co.,* 179 U.S. 19 (1900).

Inc. v. Shell Oil Co., 617 F.2d 1178 (5th Cir. 1980) (good faith dissemination of trademarked word(s) in description of goods, services or in description of geographic origin is defense to claim of infringement).

Plaintiffs' claim of "breach of contract" slides over the facts that Dr. Waddell's letter of January 18, 1982 to Colonel Miller was not an "acceptance" of any "offer" by plaintiffs, or any of them, whether to forego litigation or otherwise, nor was there any meeting of the minds of the purported parties to the after-claimed "agreement". (Decl.T.Waddell pp.5-7 and Exhibits A-E thereof.) *Autera v. Robinson*, 419 F.2d 1197, 1201 (D.C. Cir 1969), cited by USOC's attorney Mr. Kline for the proposition that "...the relative merits of a controversy are irrelevant once there has been an agreement which is predicated on a forebearance of action" (Aff.R.K-line at Exhibit D thereof) actually stands on its own facts for the proposition that even where a party *in litigation* appears to have waived certain rights in an agreement, the facts showing agreement, and the facts to the contrary, must be tried by the Court, and such a factually doubtful claim of "agreement" is not a proper basis for summary enforcement. It is also noted in the case at bar that both Dr. Waddell's letter of January 18, 1982 and Colonel Miller's letter of January 27, 1982 use the term "request" in describing Colonel Miller's statement as to the use of "Olympic" by Dr. Waddell and SFAA. (Decl.R.Kline at Exhibit A pp.4,5). Defendants vigorously contest the plaintiffs' characterization of the exchange of communication between Dr. Waddell and Colonel Miller as an "agreement". Defendants also contend that assuming *arguendo* that this Court were to find an "agreement" upon a trial of the merits of plaintiffs' breach of contract claim, the remedy of specific performance, which is equitable in nature, would not avail plaintiffs in the case at bar, because of equitable bars of laches and unclean hands arising from plaintiffs' waiting over seven (7) months after the purported agreement to seek to enforce it, on the eve of the Gay Games, when enforcement would maximize harm to

defendants.

Defendants also contend that the descriptive and popular nature of the term "Olympic", as established by its wide use throughout the world to market products and promote a variety of interests, must be weighed by this Court in considering the implications of restraining defendants' use of the word "Olympic" to advance their nonprofit cause. Even assuming *arguendo* that plaintiffs were able to prove a statutory case of infringement against defendants under the Amateur Sports Act of 1978, 36 U.S. Code section 380, the constitutional issues in this action concerning defendants' claimed rights to use that word would not disappear; oppositely, these issues would be activated for resolution by this Court. *S.T.O.P. v. USOC*, 489 F.Supp. at 1126.

B. In Balancing The Equities, It Is Obvious That The Hardships Tip Decidedly Against SFAA And Dr. Waddell In This Action.

In the final days of a non-profit corporation's and its volunteers' arduous efforts to present and promote an athletic performance for the benefit of an oppressed minority, plaintiffs USOC and IOC filed suit, seeking to enjoin the non-profit group's use of an ancient and popular descriptive word, "olympic". The plaintiffs have not shown a likelihood that they will prevail on the merits of any of their claims; oppositely, their claims depend upon gross and potentially unconstitutional reading of relevant statutes. Nor have plaintiffs shown a single fact that would support a finding that they have been or will be irreparably injured absent preliminary injunctive relief. Meanwhile, the non-profit group and its unpaid workers and participants already have been injured unnecessarily and seriously by the t.r.o. issued on August 9, 1982, which accomplished a prior restraint. And, meanwhile, the public interests in careful interpretation of federal statutes, and in even-handed and meticulous judicial balancing of rights and harms, in the context of a preliminary injunctive application where rights

of free speech and association appear to be jeopardized, have been wholly overridden by issuance of a t.r.o.

In balancing the equities in this action, defendants respectfully ask this Court to consider the widespread use of the historic term, "Olympic", in relation to diverse commercial and noncommercial activities, the good faith and the non-profit volunteer-dependent nature of defendants' actions, the public interest purposes of the Gay Games, the lack of any fact(s) showing that defendants can possibly be characterized as commercial competitors of USOC and IOC, the particular harm to defendants occasioned by plaintiffs' eleventh-hour timing in this litigation, the substantial legal weaknesses of plaintiffs' claims, the apparent defenses to those claims, the failure of plaintiffs to offer any facts that would support a finding that plaintiffs have been or even might be injured by defendants' use of the word "Olympic" in relation to the Gay Games, and the irreparable hurt and loss of rights and freedoms to defendants that would be occasioned by preliminary injunctive relief in the case at bar. Defendants respectfully conclude that such a balance can only be found to tip in favor of dissolving the t.r.o. in this action and in favor of denying preliminary injunctive relief to plaintiffs herein.

IV. CONCLUSION

For the reasons presented above, in behalf of themselves and all others who have suffered by means of the t.r.o. in this action and who would suffer unwarranted and legally unfounded aggravation of that suffering if a preliminary injunction were granted in this action, defendants San Francisco Arts & Athletics Inc. and Dr. Thomas Waddell respectfully urge and move this Court to order the said t.r.o.

to be dissolved immediately, and to deny plaintiffs' motion for preliminary injunctive relief.

Dated: 16 August 1982

Respectfully submitted

By: Mary C. Dunlap (signed)
An Attorney for Defendants

(Certificate of service omitted in printing.)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Mary C. Dunlap in Opposition to Plaintiffs' Motion for Preliminary Injunction and in Support of Defendants' Motion to Vacate Temporary Restraining Order

I, Mary C. Dunlap, do hereby declare under penalty of perjury:

1. I am counsel for defendants in this action and I am a member in good standing of the Bar of this Court.

2. From the date of issuance of the temporary restraining order in the action, August 9th, 1982, I have sought to provide advice and counsel to the numerous persons who are restrained by the order as to their responsibilities pursuant to it. I have received inquiries and handled problems from literally dozens of persons. Many of these persons have expressed grave concern and fear to me as to the consequences to them and others if there are any errors in interpreting and obeying the order. In order to prevent anyone from being punished for using the word "Olympic", and regardless

of the First Amendment freedoms that I believe have been and are being infringed by the order, I have been obligated to advise all of these persons to avoid using the word "Olympic" except in answering media-generated inquiries concerning events on and prior to August 9, 1982.

3. Attached to this declaration, and marked "Exhibit A" of this declaration, is a copy of articles concerning the Gay Games from the Bay Area Reporter (B.A.R.), a local gay community newspaper. The word "Olympic" has been excised throughout said articles.

4. At my instruction, defendant Dr. Waddell requested four (4) volunteers to search the public telephone directories of as many cities as possible under time constraints of this submission to establish the extent of usage of the term "Olympic" as indicated by listings in said directories. Attached to this declaration, and marked "Exhibit B" of this declaration, is a copy of the telephone listings copied by machine and by hand on the parts of the researchers.

Dated: 16th August 1982

Mary C. Dunlap (Signed)
Declarant

5. Signed copies of the Declarations of Hydie Downard, Brenda K. Young, Edward H. Peterson and Mark Brown will be presented to the Court and to plaintiffs' counsel at the hearing on August 19th, 1982. These are unavailable as of time of filing of this opposition to plaintiffs' motion for preliminary injunction.

Dated: 16th August 1982

Mary C. Dunlap (Signed)
Declarant

(Exhibits A & B omitted in printing. Exhibits A & B are in Record Docket #13.)

Munich Olympics, to not participating in the last Olympics in Russia and not to take the innocence of the Gay _____ Games and trying to actually *discriminate* us—I feel this is unfair and unjust.

My rights as an American is being threatened and stripped and hurts beyond belief. Being first generation Jew from parents in Poland and through World War II—and as my whole family was killed during that war, I feel once again, one more time—are we to be wiped out again? God help us—Please open your eyes and hearts—change the vicious cycle.

Date August 16, 1982

Sara Lewinstein (signed)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Alita Rosenfeld in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Alita Rosenfeld, PhD., do hereby declare, under penalty of perjury: that:

1. I am Alita Rosenfeld, PhD., and my function with the Gay Olympic Games is Sports Co-chair; Women's Outreach, and Board of Directors. My address is 622 Miller Creek Road, San Rafael, California 94903.

2. I have been involved since May 1, 1982. I would like to see Gay men and women get together in an event that is supportive for all and shows the full spectrum of gay people's talents and abilities.

3. The Games are a non-profit California corporation.

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Sara Lewinstein in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Sara Lewinstein, do hereby declare under penalty of perjury:

1. I am Sara Lewinstein, and my function with the Gay Games is Co-Chair of Bowling, Women's Outreach and member of the Board of Directors. My address is 1255 7th Ave. San Francisco, CA 94122.

2. I am involved with the Games for the purpose of uniting men and women in one of the most positive and healthy ways possible, to better ourselves within our *entire* community—and what better way to show our politics and strength than through *SPORTS!!* I personally live through sports and in hopes of bringing more PEACE into people's lives—a way to unite together—a way to meet new people, no matter what color or race they are. My hopes and expectations are to *unite* as a majority, one and all.

3. & 4. I have worked very hard for the past year on a volunteer basis—hard as volunteerism is, we have succeeded this far in scraping funds from many other people and businesses who also believe and want to help with our goals—which has become their goals now too!

To have the TRO on us is like cutting off my soul. Where is FREEDOM OF SPEECH and sexual preference going to be defined. More than that—what did America stand for. We have used and abused athletes for purpose of *politics* for much too long. From my brother JEWS being killed in the

funds have been raised with sponsorship, by individuals and businesses and selling tee-shirts, pins and posters.

4. I am upset that the U.S.O.C. has decided to discriminate against the G.O.G. and try to stop us. It is clear that this is homophobia.

5. I will not be selling tee-shirts, pins and posters. I will be available to sign this at our Board of Directors meeting this Friday, August 13th 1982.

Date: August 15, 1982

Alita Rosenfeld, PhD (Signed)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Thomas F. Waddell in Support Of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction

I. Thomas F. Waddell M.D., do hereby declare, under penalty of perjury:

1. WHO. My name is Thomas F. Waddell, M.D. and my address is 141 Albion Street, San Francisco, CA 94110. I am a physician, and until the Gay "Olympic" Games project began I was Medical Director of Whittaker Corporation of Los Angeles. With Whittaker's permission I took a leave of absence early in 1981 to begin organizing. I am presently a non-salaried volunteer serving as President of San Francisco Arts and Athletics, a California non-profit organization, and Chairman of one of our projects, the Gay "Olympic" Games.

2. WHY. I am involved with the Gay "Olympic" Games as

an organizer because these Games offer three very important opportunities.

1) To provide a healthy recreational alternative to a suppressed minority.
2) To educate the public at large towards a more reasonable characterization of gay men and women.
3) To attempt, through athletics, to bring about a positive and gradual assimilation of gay men and women, as well as gays and non-gays, and to diminish the ageist, sexist and racist divisiveness existing in all communities regardless of sexual orientation.

As one of the architects of this project, it has been my hope to develop a greater communication and understanding between gay and non-gay communities. It has always been my intent to do this using a totally volunteer non-profit organization which would embrace a philosophy of gradualism, altruism and exemplary action. Athletics and cultural endeavors seemed to lend themselves most appropriately to the goals, and both are embodied in an Olympic-style format.

I am informed and believe that the positive identification of a variety of "Olympics" (e.g. the Armenian Olympics (Exhibit-BB), Police Olympics, Olympics of Ballet, Olympics of the Mind, Senior Olympics, Golden Olympics, Firemens Olympics (Exhibit-EE)) and even the positive attraction of large groups of people to such events as the Crab-Cooking Olympics, Dog Olympics, Nude Olympics, Rat Olympics, WackyOlympics, Xerox Olympics and Alcoholic Olympics have enjoyed trouble free execution year after year with no legal action by the USOC. (Please see appendix 1)

My expectations were that people of all persuasions would be drawn to the event because of its Olympic format and that its nature of "serious fun" would create a climate of friendship and co-operation. Furthermore, false images and misconceptions about gay people would decline as a result of a particpatory educational process, and benefit ALL

communities. I am delighted that that expectation has been, to a large extent, fulfilled, except for the temporary restraining order and lawsuit by USOC et. al.

2. WHAT. San Francisco Arts and Athletics is a non-profit, public benefit California corporation. It has no paid employees, and it has derived its funding from sponsorships donations, spaghetti feeds, dances, public benefits, auctions, raffles, sales of tee-shirts, buttons, posters and cultural events, predominantly in the gay community, but open to all. We have managed to bring together diverse and disparate groups of people in the gay and non-gay community in all our activities, and have established ourselves as a project that consistently benefits the San Francisco community at large. Furthermore we have initiated communication and dialogue among communities all over the world, where none have previously existed. Furthermore, we have an entirely different philosophy than the traditional Olympic Games in that we are emphasizing participation and co-operation and recreational competition as opposed to emphasizing winning and nationalism. Our mandate is to bring people together for greater understanding and physical fitness and not for the purpose of establishing one group being better than any other. San Francisco Arts and Athletics and its games are not operated and are not designed for commercial gain.

3. EFFECT OF THE TRO. The temporary restraining order issued to us has severely damaged our funding (sale of shirts, buttons, other spinoffs etc.) our Public Relations (many potential spectators are under the impression that our Games have been cancelled), our image (it is clear to the public at large that there are many other kinds of 'Olympics', and they see this as demeaning to the term 'gay' rather than the use of the word 'Olympic'). We are now in the process of inking out all our posters, correspondence, information etc., and spending a great deal of time, resources and revenue at a time that is crucial to our event.

4. COMPLIANCE We have complied with the temporary restraining order by deleting the word 'Olympic' from all our

letterheads, correspondence, posters, tickets, program, articles, in short, anything containing the word 'Olympic'. We have removed the word from the awning outside our office. We have stopped the sales of all Gay Olympics Products franchised to local merchants. All, I should add, at considerable cost, inconvenience and precious time. This action has had a severely deleterious effect on the progress of the Games. Irreparable harm has already occurred.

5. BACKGROUND INFORMATION We, San Francisco Arts and Athletics filed papers of incorporation in Sacramento about mid year 1981. In that application we used the word 'Olympic' (Golden Gate Olympic Association). We were told at the time the word 'Olympic' could not be used in a corporate title. We subsequently filed for incorporation on November 4, 1981, as San Francisco Arts and Athletics.

It was our belief, however, that though we could not use the word 'Olympic' in our corporate title, we were not prevented from using the term to describe one of the events we intended to sponsor, i.e. the "Gay Olympic Games". We began using the words "Gay Olympic Games" on our letterheads and mailings and in the local gay press as early as September of 1981.

In mid-December 1981, I received a call from someone at the Women's Sports Foundation, who told me that we may be in trouble. She related that someone from the USOC had been in her office and noticed our newsletter and told her to call us.

She did call us and gave me the number of Olympic House in Colorado Springs, Colorado. I called and spoke to Mike Moran of the Public Relations Department. I described our activities and told him I was aware of other "Olympics" not sanctioned by the USOC. He told me that we should write a letter to the USOC. requesting permission to use the word "Olympic". He also said that it is generally just a formality because the USOC. could not go about taking court action on everyone who uses the word "Olympic".

On December 26, 1981, I mailed a letter (Exhibit A) to Mr. Don Miller explaining our aspirations and reasons for using the term "Olympic".

On December 28, 1981, I received a letter from Mr. Miller (Exhibit B) written on December 23, 1981, warning our organization that we were in violation of Public Law 95-606 and asking us to terminate immediately any reference to the word "Olympic" with respect to our activities and to refrain from using such terminology in the future. He gave us ten (10) days of receipt of the letter to acknowledge his request.

Our organization, still in its formative stages, did not immediately seek legal advice, and on January 15th, 1982 (12.38pm Pacific Standard Time), I called Mr. Miller and asked for a response to my request. He explained the USOC.'s position which I readily understood, and he reiterated his demand to us to cease use of the term "Olympic". I understand his position but did not, and still do not, agree with it.

On January 18, 1982, I wrote to Mr. Miller (Exhibit C) responding to his request because our committee felt threatened and uncertain of our rights. We decided as an interim measure and in a spirit of legal compromise, to drop the word "Olympic" while we sought legal counsel.

We did seek counsel from Attorney Mary C. Dunlap who appraised us of our rights and demonstrated to us the discriminatory demands and unconstitutionality of the USOC.'s position.

I then wrote to Mr. Miller on January 26, 1982, (Exhibit D), informing him of our position subsequent to legal counsel and we suggested an amicable resolution of the issue by February 1, 1982. We furthermore suggested that we would consider seeking formal resolution through federal civil action if no such resolution was forthcoming.

Mr. Miller's letter of January 27, 1982 (Exhibit E) was in response to my letter of January 18. This was our last correspondence.

On February 2, 1982, I spoke to the Northern California

chapter of the ACLU about the issue and their advice was: 1) do not take action against the USOC and 2) if a law suit was filed against us, they would defend us. We then decided to resume the use of the word "Olympic" in the firm belief that we had as much right to use the term as other organizations who had used it without permission from the USOC. I called the "Police Olympics" and the "Armenian Olympics" which had had annual games for a number of years and had also been warned by the USOC's request to drop the term "Olympic". Both organizations had ignored the request and had not suffered an injunction by the USOC. I, myself, volunteered to officiate and serve as a medical doctor for the "Police Olympics" and witnessed the official "Police Olympics" program and tee-shirts (Exhibit F tee-shirt).

There were several letters exchanged between our attorney Mary Dunlap, and USOC attorney Richard G. Kline. The USOC had considered the matter "amicably resolved".

To my knowledge, there has been no further correspondence and we have been using the term "Olympic" publicly since February 1, 1982. Having avoided use of the term "Olympic" from January 18, 1982 to February 1, 1982, caused us a great inconvenience and began to erode our credibility as a serious event. We had no intention of permanently waiving our rights.

6. OUR ORGANIZATION AND PURPOSE

The charter of San Francisco Arts and Athletics states it to be a non-profit, public benefit, educational organization. We have, as a 501-C-3 fiscal agent, San Francisco Tavern Guild Foundation.

We are volunteers and all our revenues are obtained through our own fundraising activites, predominantly local, and predominantly gay sources. Our budget is approximately $250,000 of which approximately $100,000 has been raised.

We are interested in creating a more realistic image of homosexual men and women in all societies. We are also interested in providing more alternatives for homosexual

men and women to move into the mainstreams of their respective societies. We believe that homosexuals, by being stereotyped are stigmatized into ghettos. We further believe that athletics and cultural endeavor is a healthy and positive way to create more opportunities for assimilation and diminishing prejudices.

Moreover, our philosophy also attempts to create a different climiate of competition than in the traditional Olympic Games. We want to stress self-fulfillment rather than winning; we want to exploit the potential for combining physical fitness and achievement through competition without making winning the most important element.

We also want to minimize nationalism, so we used cities as the smallest common denominator. To minimize ageism we have made some events "age-group" competitions. To minimize sexism we have mixed the genders in some sports (relays in swimming and track and field, for example, are mixed).

Our promotional materials attest to all of the above goals (Exhibits G,H,I,J,K).

Another important aspect of our event was the promotion of cultural events. We wanted to encourage gay men and women to explore their creativity and provide balance to the physicalness of the Games. We sponsored cultural evenings (Exhibits L,M,N,O,P,Q) and have planned evenings of music, film and theater (Exhibits R,S,T) during the week of the Games to emulate the true nature of an Olympiad; that of athletics and art.

Finally, we wanted to set a tone of friendship and co-operation to surround the Games and decided on a torch run to begin at Stonewall in New York City, site of the 1969 riot and generally considered the historic beginning of "Gay Liberation" in America. The torch would be carried across the United States by more than 2,000 runners and be carried into Kezar Stadium for the opening of the Games (Exhibit U).

In attempting to eliminate discrimination we felt that we

could not turn about and discriminate, so being "gay" was of no consequence. I have yet to encounter a test to tell if someone is or is not homosexual, and that is the crux of the educational value of the Gay Olympic Games; the differences between gay and non-gay have to do with an individual's choice, and should not be the sole criteria for judgement of character.

We are interested in seeing ALL people come together for healthy reasons. Sport and art are the best vehicles we can imagine.

7. WHAT HAS HAPPENED

The response to our proposed event has been rewarding (Exhibit V). We have brought together previously disparate groups of people, gay men and women, gays and non-gays, Catholics and Jews, Democrats and Republicans, rich and poor. We have stimulated new dialogue in communities world wide and have created a climate of goodwill and enthusiasm for all involved (Exhibits W and X).

8. WHY OLYMPIC?

The term "Olympic" best describes our undertaking. It is for the same reasons—those of peace, friendship and positive social interaction—that the Police and Firemen, Armenians and Senior Citizens, Handicapped and Youngsters all enjoy their own separate "Olympics".

If the purveyors of law and order (the Police) are able to ignore a Federal law and escape judgement, it seems perfectly obvious to me that the "Gay Olympic Games" are being selectively prosecuted. Since I know of no other organization, athletic or otherwise, using the term "Olympic" having been restrained from such usage by the USOC I must conclude it is not the word "Olympic" that creates so much objection but the word "gay".

I have also submitted our press kit (Exhibit Y) as additional information regarding the nature of our endeavor.

I have been working (pro bono) for the Police Activities League of San Francisco for one year as their physician for boxing. As a result I was asked to perform a similar duty at

the 16th Annual Police Olympics.

I had been aware of the Police Olympics for years and in February 1982 I called Officer Joe Mollo of the San Fracnisco Police Department who was director of the 1982 California Police Olympics. He told me the winners would go to Dallas for the National Police Olympics, and then on to the International Police Olympics. I asked Officer Mollo what, if any, problems he had had with using the term "Olympics". He said "we received a letter telling us not to use it, but we are ignoring it". The USOC *was* aware of their event.

I did work for their event which began on July 7th and submit their program as Exhibit Z, and I refer specially to page 4 describing their organization which is not unlike our own. Their awards (medals) also used the term "Police Olympics". Furthermore I point out the five interlocking rings of their logo, of which two of the rings are handcuffs.

I have also been made aware of the "Firemans Olympics" held in July-August of this year. See Exhibit AA which uses five interlocking rings in front of a lighted torch.

In reference to our alleged violation of "Olympic" symbols, I am only aware of the use of the term "Olympic". We do not use five interlocking rings. We have totally dissimilar logo which depicts three integrated discs, not rings, in a fashion that bears no resemblance to the five interlocking rings of the traditional Olympic Games. See Exhibit BB, CC and DD which depict our logo as well as our event title. The word "GAY" always precedes use of the word "Olympic".

Exhibits EE and FF also attest to the fact that when we conceptualized our event we were interested in using sports events that were already popular as organized sports in gay communities. There are six departures (billiards, bowling, rugby for women, softball, powerlifting and physique) from the traditional Olympic Games, as well as many omissions (equestrian, gymnastics, fencing, water polo, weightlifting, field hockey, shooting, judo etc. etc.) which do appear in the traditional Olympic Games. See Exhibits II and JJ.

9. THE EFFECT OF OUR EFFORTS

Our philosophy and outreach has engendered a great deal of good will, approval and participation throughout the Bay Area and across the United States. Dianne Feinstein, Mayor of San Francisco, has been an ardent support of the "Gay Olympic Games" since its inception. She proposed a proclamation creating "Gay Olympic Games Week" for August 28th to September 5th, and in fact delivered the proclamation at a news conference in her office on Thursday August 12th. (Exhibit AA). She, at our request removed the term "Olympic" from the proclamation, to our mutual embarrassment and consternation. A similar proclamation was presented to the Police "Olympics" this year (see Exhibit Z page 2) with no restrictions on the term "Olympic". In addition to her proclamation was a commendation to the Gay Games on behalf of the Board of Supervisors of San Francisco for our work in the project.

I pray that there is a rapid resolution of the issue in favor of the "Gay Olympic Games" so that the damage to our event is minimized.

Date August 15, 1982

Thomas F. Waddell M.D. (Signed)

(Exhibits and appendixes to the Declaration omitted in printing. Exhibits are in the Record, Dockets #'s 17 and 28.)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Michael R. Evans in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Michael R. Evans do hereby declare, under penalty of perjury: that:

1. I am Michael R. Evans, and my function with the Gay _____ Games is member of Board of Directors and Attorney. My address is 2120 Market St. #203, San Francisco, CA 94114.

2. I am involved with this organization because I believe it is very important to help dispel public prejudice about Gay people.

3. This is a non-profit, public benefit corporation, engaged in charitable and educational activities relating to correcting the public images and perceptions of Gay People. (Exhibits CC, DD) We are an all-volunteer organization which exists on public donations from those who believe in our cause.

4. As both a Board member and an attorney, I have been charged with handling the routine legal affairs of the Corporation. The effect of the T.R.O. on me has been to distract me from my regular legal duties to spend my time instead worrying about problems of compliance. This is at the very time when we have important tax and other planning matters which should have my complete attention on the very eve of the Games.

5. Every time that I have seen the word "Olympic" on any of our materials, I have checked to see that it was covered-over, or made sure that someone was going to take care of it. This is an exceedingly tedious and wasteful expenditure of time, which has made the frantic pace of activity at our office even more chaotic.

8-15-82

Michael R. Evans (Signed)

(Exhibits omitted in printing.
Exhibits are in the Record, Docket #s 18 & 28.)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Richard C. Leonard in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Richard C. Leonard do hereby declare, under penalty of perjury: that:

1. I am Richard C. Leonard, and my function with the Gay _____ Games is that of Volunteer Coordinator; Chairman. My address is 49 Molino Avenue, Mill Valley, California 94911.

2. I became involved with the Gay _____ Games for several reasons. My personal and professional life was in a period of great transition. In order to re-enter into the social and professional world, I decided to do volunteer work. I had heard of the Gay _____ Games and thought it was a good cause; one which would be interesting, fun and gratifying to work for. The Gay _____ Games particularly appealed to me for several reasons. I have always had a love of sports and the arts, yet I have had difficulty in meeting people with similar interests, especially in the former. This organization seemed to offer an ideal opportunity to work with and meet people from a large cross-section of the gay community who shared a common interest. In addition to meeting people and working with them towards a common cause I hoped to help create an event which would be enjoyable to everyone to participate in, watch and work for. An event that would help dispel many myths and stereotypes about gays and lesbians.

I place great value on arts and athletics, straight or gay,

and their importance for individuals and society as a whole. I have also been very distressed by the separatist elements within the gay community—which I hope would begin to be mended by this kind of united effort. I have been very pleased and impressed by what I have seen so far. The support which we have received from and the 'education' which we have imparted to many in the heterosexual community has been most gratifying. Finally, I have received an extraordinary opportunity to hone and expand my managerial skills, organizational abilities and experience in working with a diverse group of people in a personal way.

3. The Gay Games are a non-profit organization run entirely by volunteers. The intention never was, nor shall be, materialistic. Rather, it is idealistic. Money has been raised through sponsorship, personal contributions and fund-raisers. No individuals or groups have used this opportunity for financial gain. They have given because they believe in the idea, and wish to support it. None have contributed more than those individuals who have given freely of their time and talent to produce this event. Through our efforts, we have united people from across the country and around the world. Hopefully, permanent networks of athletes will be established as the result of our work. I have personally answered many letters from people all over the world who have written to say 'thank you' for doing this.

The excitement and interest we have generated has been exceptional. I have sold tickets to an individual who could not come, but wanted them for commemorative reasons. I have sent information to a man in Sri Lanka who believes in us and who wanted to spread the word. I have received many letters from small-town Americans and Europeans who wanted merchandise and information; who wished us well; who would have liked to be here and who expressed their appreciation (and envy) of San Francisco and of what we are capable of doing. Most importantly and rewardingly, they felt involved in absentia, and united by our accomplishments.

4. The Temporary Restraining Order has had an effect on

my work in the following ways:

1. I have had to deny to persons their interest in purchasing tee-shirts, posters, pins, buttons etc.

2. I have had to answer the phone "Gay Bleep Games". While this can sometimes be amusing on a superficial level it is patently absurd.

3. I have been unable to send out information without spending an inordinate amount of time on censoring the literature.

4. I have had to watch key people devote an inordinate amount of time to this literature, which has made them inaccessible, and placed an extra burden on the rest of us.

5. After an initial delay in ordering tee-shirts, the TRO has necessitated a further delay and a change in design which is esthetically disappointing and ideologically distressing.

6. I am personally offended by the action of the USOC and the IOC. They have not only personally placed us below "crab-cookers" and "xerox people", thereby displaying bias and discrimination, but by taking this action at the last minute they have created not only a loss of revenue but also extreme disruption of our organizational efforts.

5. I have complied with the TRO completely.

A. I do not sell merchandise with the word 'Olympic' on it.

B. I do not use the word 'Olympics' in replying to or making phone calls.

C. I have changed the original design of all tee-shirts.

D. I have censored all literature I send out of the office concerning the Games.

E. I have issued instructions to all volunteers to take similar action with regard to points A, B and D.

August 15, 1982

Richard C. Leonard (Signed)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Mark Brown in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Mark Brown do hereby declare, under penalty of perjury: that:

1. I am Mark Brown and my function with the Gay Games is co-founder of the organization, Secretary-Treasurer of the corporation (S.F. Arts and Athletics, Inc.), Secretary-Treasurer of the Board of Directors and Sports Committee Chairman of the 1982 Gay _____ Games. I live at 4323 - 20th Street, Apt. No. 7, San Francisco, California 94114.

2. As Co-Founder of this organization; along with Dr. Tom Waddell, I wanted to see Gay Men and Women brought together in sports to compete in an olympic type atmosphere. To compete in an atmosphere that "I am Gay and proud of it".—to compete as Human Beings and not parasites—to compete in an atmosphere void of harassment and ridicule that would surely arise if they were competing in the regular Olympic Games and admitted they were homosexual.

These games are important to all of us, Gay, Straight, Black, White, Chicano—all of us—not because Gay's are better than anyone else but because gays are equal in stature and are normal human beings as all else, not freaks as so many straight people are led to believe.

I personally do not expect to gain anything out of these games other than the satisfaction of seeing Gay men and women athletes perform to their best ability in an olympic

style competition. I have devoted my life for the last two years in promoting and planning these games. The Gay Games consists of 17 competitive sports for men and women of all ages to participate in. Thus far, 11 countries, 25 states, 110 cities and over 1,300 athletes have entered these games.

4. San Francisco Arts & Athletics is a non-profit corporation. All monies raised have been by donations and fund-raisers. The San Francisco Gay Community has supported this endeavor from the beginning. The national and international support has also been outstanding. This endeavor has brought Gay men and women together from all over the world in a common cause—SPORTS! This temporary restraining order has hurt the income of these games tremendously—our T-shirts, buttons, pins and posters are our main sources of regular income. We have no paid positions, but the expenses at this time are astronomical. These games are costing approximately $250,000 to put on. This TRO is harming our income to meet expenses.

As for me personally, as an American citizen, having lived a full and complete life for my 48 years, this TRO is depriving me of my rights and freedoms as an American. No one, especially our United States Congress, without the approval of the people, have the right to disallow any citizen their right to the non-profit and non-commercial use of any word in the dictionary. It is un-constitutional and must be corrected.

Because of the TRO, I have taken steps in the department I am in charge of to refrain from using the word "olympic" until this crisis has been resolved.

I am available to sign this document at any time.

Undated

Unsigned

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Zohn F. Artman Jr. in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Zohn F. Artman Jr. do hereby declare, under penalty of perjury:

My name is Zohn F. Artman Jr. and my function with the Gay _____ Games is as a member of the Board of Directors of San Francisco Arts and Athletics Inc. My address is 9, Turquoise Way, San Francisco, Ca. 94131.

2. I am a 20-year resident of San Francisco and have spent the last eleven years as an active San Franciscan and member of the local entertainment community. For 8½ years I was V.P. Press and Public Relations for Bill Graham Presents, and for the most recent three years have operated my own media firm, Zohn Artman Presents. The client list for my company includes Bill Graham Presents, The David Geffen Company, The Grateful Dead, the Pride Center, Atlas Savings and Loan, Huckleberry House ... as a partial list. Because of this media experience I happily agreed to bring my talents to the Gay Games: obviously the Gay Games needs media attention.

The Gay Games present to me, as a loving San Franciscan, a real opportunity to allow the world, not to mention parents and family members, to see their gay sons and lesbian daughters as healthy, athletic people leading happy, participatory lives. These games have created for the gay community an opportunity to participate in sports where the goal is

not being from the 'best' country or nation; nor about being the 'best', or about men being stronger or better than women—rather these games have as their goal a real chance to be a participant for the sheer joy of it.

3. San Francisco Arts and Athletics is a non-profit organization, raising funds in grass-roots ways. Musical fund-raisers in private homes have raised $100 to $400 plus. Auctions in bars and restaurants have raised hundreds, sponsors at $200 each have raised thousands. The support from the total San Francisco community has been overwhelming and heart-warming. All funds raised are being applied to the expenses of putting on these Games.

4. The TRO has hurt me only in the personal sadness I feel as an American and my loss of the protection I have always felt under the Bill of Rights on which this great country is founded. As far as my Gay Games related activities, the TRO has created a giant amount of media work to cover it, and may I add that all of my work has been pro bono; and this extra TRO work has taken my focus off the sports events, the Opening and Closing Day ceremonies, including the important job of selling tickets through making our ticket-buying public aware of how to purchase tickets to these events. All of this activity has had to be put on 'hold' while I deal with the TRO press and problems related thereto. In addition I have been busy asking our outlets to take the merchandise off their shelves with the TRO name on it.

August 15, 1982

Zohn F. Artman Jr. (Signed)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Brenda K. Young

Declaration of Brenda K. Young in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Brenda K. Young do hereby declare, under penalty of perjury: that:

1. I am Brenda K. Young, and my function with the Gay _____ Games is Editor of Gay _____ Newsletter, member of Board of Directors. My address is 410 Bellevue Ave. Oakland, CA 94610.

2. I am involved because of the tremendous effect athletic participation has had in my life, combined with my feeling that gay men and women could work equally together in this venture, the Gay _____ Games became my sole extra-curricular activity.

3. I have been involved with the Gay _____ Games for over one year. I have been intimately involved in our efforts to obtain non-profit status. I personally created fundraising situations where local business people donated space, time and money for our effort. It is a community venture—unifying segments which have previously, always, been disparate. Gay leaders throughout the country are watching and applauding the effect this event is having on not only the "gay community" throughout the world, but also the non-gay populace which is more readily willing to identify with us through our athletic garb.

4. The TRO has hindered my efforts as Editor of the Gay Games Newsletter to present a smooth readable and

informative letter. Production was held up for 4 days past deadline until the ramifications of the TRO could be assessed. As a publicist, the TRO has created a logjam in my efforts to promote the Games, encourage the purchase of tickets and to further encourage residents of the Bay area to house the 1,500 athletes coming to San Francisco for the period August 28-Sept. 5.

To comply with the TRO, I have taken the following steps:

I have deleted every reference to the word "Olympic" in the Gay Games newsletter.

I have crossed out the word "Olympic" on all fundraising literature that I have come across around San Francisco.

I have explained to all those who have asked that our organization is temporarily forbidden to use the word "Olympic.

Date:
Signed: (Unsigned)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Harriman Thatcher in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Harriman Thatcher do hereby declare, under penalty of perjury:

My name is Harriman Thatcher, and my function with the Gay _____ Games is Cultural Week Co-ordinator. My address is 507 Peralta Avenue, San Francisco Ca. 94110.

I am retired and wanted to participate in meaningful volunteer work. The Gay _____ Games provided a made to order opportunity to counteract the negative image of gays as athletes but as human beings as well. Frankly, I was ready to come all out for a cause that restored honesty to my life and pride in the work of the Games.

3. I am familiar with the non-profit nature of the sponsoring organization and its efforts to raise funds on the basis of goodwill for its own cause.

4. In my own area of responsibility the TRO is causing considerable concern from a mechanical point of view. I have a number of circulars and programs at the printers which must be changed. The resulting confusion may limit participation and therefore attendance at the two cultural events scheduled.

5. I have ordered that all printing, notices, etc, be stopped in order to comply with the Court's directions.

Date: 8-16-82

Harriman Thatcher (Signed)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Edward H. Petersen in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Edward H. Petersen do hereby declare, under penalty of perjury: that:

1. I am Edward H. Petersen, and my function with the Gay _____Games is Athlete's Discount Coupon Pack

Organizer. My address is: 284 Richland Avenue, San Francisco, California, 94110.

2. I am involved because I think the Games will help change preconceived stereotypical notions about who gay people are, what we look like, and how we act. The Games would give gay people good (P.R.) exposure for a change. I also feel that it is critically important for gay people of different nations to get together to exchange ideas, to see the similarities and differences in our perspectives about our positions in our societies, in order for each of us to formulate plans to make our lives and lifestyles better. This exchange of ideas will help foster better understanding between different peoples of different nations. I think that this understanding along with the athletic participation and cultural events are much more in line with the ideals of the original Olympic Games than the current political jockeying that occurs at games sponsored by the International Olympic Committee where nation is pitted against nation for political prestige in the international arena of public opinion.

The nature of the Gay _____ Games is one of total gay community involvement throughout the USA and the world. The torch is being lit at Stonewall in New York, where the first definitive stand against gay harrasment and gay discrimination occurred in the United States. Gay women and men from countries across the USA are carrying it from Stonewall to San Francisco. I see this torch as a symbol of freedom from the pervasive homophobia so strongly entrenched in some segments of our society; it is an educational symbol, both to the gay community itself and to the general populace.

No one is involved in the games for the money. All of us are volunteers. The Gay Business Community across the nation has been supportive, both financially and philosophically. The Gay press in Europe, Australia, New Zealand, Canada have covered the preprarations for the games extensively because of the pride that the games will engender in the gay community. Fund-raising through the sales of

posters, buttons and tee-shirts has been financially important to the games. The business community is donating discount coupons to be given to each of the athletes to ensure that they will enjoy their stay here during the games. I am organizing that effort, which is supported even by non-gay businesses such as Marriott's Great America. There has been international gay community involvement and support for the games.

4. The Temporary Restraining Order has hindered my efforts to get the Athlete's Discount Pack together. My flyers all have the word "Olympic" on them in seven places so I have to amend each flyer by hand.

5. I have taken the following steps to comply with the TRO:

A. Crossed out and/or blacked out the word "Olympic" on all flyers and stationery that I have used.

B. Advised all business owners that I have been able to contact not to use the word "Olympic" in their athletes discount coupons which they are preparing for the athletes.

Date: (Undated)

Edward H. Petersen (Unsigned)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Paul Mart in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injuction.

I, Paul Mart do hereby declare, under penalty of perjury:

that:

1. I am Paul Mart, and my function with the Gay _____ Games is Assistant to Tom Waddell, Fund Raising, and member of the Board of Directors, S.F. Arts and Athletics. My address is 2101 Sacramento Street, San Francisco, California, 94109.

2. I believe that there is a need to show the world that "Gay" people are in every field—that sports and music are the best way to get people to understand each other and bring us all closer together.

3. By helping to raise funds, we did not have to call upon city or state funds—The Gay Games will bring happiness and goals to Gay people, otherwise not afforded to them.

4. TRO has caused me to be upset at Olympic (International) to which I contribute, and have attended two games. I see no reason for this TRO. I believe the word "olympic", as described in the dictionary, is originally Greek, and no one can give this word to anyone. Also, our logo is different, our posters and colors are completely different and no one can confuse the two! No one has ever contested the word "Olympic" before—I feel I personally am singled out because I am helping with these Gay Games.

5. Have assisted in removing the name on all publicity, etc.

I will sign this statement anytime.

Date: August 14, 1986

Paul Mart (Signed)

File Date: August 16, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Declaration of Derrill Loberg in Support of Motion to Vacate T.R.O. and in Opposition to Motion for Preliminary Injunction.

I, Derrill Loberg do hereby declare, under penalty of perjury: that:

1. I am Derrill Loberg and my function with the Gay _____ Games is to locate housing for the visiting athletes and to serve on the Board of Directors.

2. I've become involved with the Gay Games (over a year ago) because I wanted to become involved with a community organization which would benefit the people as well as being a fun event. What better than an athletic event with a cultural week. This way, everyone could participate. • • • I joined in as a helper in fund raising—auctions, etc. I would meet the local businesses when gathering articles for the auctions. These people were generous in their donations as well as bidding on items. They all believed that the Gay Games was a worthwhile event. My belief in the event was greatly strengthened by this support. I have been involved with bake sales, basketball games, piano recitals and many more fundraising events.

4. The TRO has taken a great deal of my time and energy from the original goals of the games—and I have complied with this TRO in every way possible.

I am available to sign this document at any time.

Date: August 15, 1982

Mr. Derrill Loberg (Signed)

File Date: August 18, 1982

(Names & caption omitted in printing, see J.A. 5, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Reply Memorandum in Support of Request for Preliminary Injunction

* * *

(Indexes omitted in printing.)

I. SFAA's NON-PROFIT STATUS GIVES IT NO RIGHT TO INFRINGE PLAINTIFFS' PROTECTED MARKS.

A. Section 380 of the Amateur Sports Act applies to defendants.

Defendants assert that because San Francisco Arts & Athletics ("SFAA") is a non-profit California corporation, any "Olympic" activities it organizes, promotes or conducts do not constitute "trade" and are therefore not within the purview of 36 U.S.C. § 380(a). The assertion does not withstand scrutiny.

First, the express language of section 380(a) provides that plaintiff's names and marks may not without USOC's consent be used to promote "*any* theatrical exhibition, athletic performance or competition," regardless of whether such promotion constitutes "trade," or whether the performance or competition are profit-making.* But defendants are using "Olympic" and the simulated IOC symbol to promote such activities, and the statute plainly forbids this.

Second, even if the statute made no reference to "athletic

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* Under defendants' theory, liability for infringement might hinge on whether an athletic performance or competition turns a profit to its organizers.

performance or competition," section 380 (a) applies to "*any* person," and there is no basis for distinguishing those juristic persons organized for profit from those engaged in non-profit activities. Under California's Non-Profit Corporations law, a so-called public benefit corporation such as SFAA (Evans Decl., Exhs. CC, DD) may conduct a wide variety of activities, including:

> "Carry on a business at a profit and apply any profit that results from the business activity to any activity in which it may lawfully engage" (Cal.Corp.Code, § 5140(1)).

Third, even if the statute prohibited use of "Olympic" and plaintiffs' marks only for purposes of "trade," defendants here are engaged in trade. They sell "Olympic" T-shirts, buttons, posters and bumper stickers displaying various "Olympic" designations (Miller Aff., Exh. C, pp.3, 5). Defendants are organizing and promoting an international "Olympic" sports competition as well as a variety of other "Olympic" festivities by use of the mail, marketing commemorative items and souvenirs, accepting entries from prospective participants located throughout this country and abroad, and disseminating promotional advertisements contained in defendants' publications to raise money to support the Gay Olympic Games (Walker Decl., Exh. B; Petersen Decl., p. 3, Brown Decl., pp. 2-3; Rosenfeld Decl., p. 2). That defendants do not anticipate a profit from these activities is immaterial: "It is not necessary, in order to constitute trade or business, that it shall be carried on for profit" (*Medical Association* v. *United States* (D.C.Cir. 1942) 130 F.2d 233, 237, affirmed (1943) 317 U.S. 519).

B. The S.T.O.P. case is inapposite.

Defendants attempt to persuade the Court that section 380(a) should not be applied to them by relying upon *Stop the Olympic Prison* v. *U.S. Olympic Com.* (S.D.N.Y. 1980) 489 F.Supp. 1112. Such reliance is misplaced. S.T.O.P. was a non-profit public interest group concerned with prison reform and organized to increase public awareness of and

generate opposition to the construction of a Federal prison that would also be used to house athletes participating in the 1980 Lake Placid Winter Olympic Games. To further its protest activities, S.T.O.P. designed and distributed a poster with the legend "STOP THE OLYMPIC PRISON" which displayed the Olympic rings and torch. These posters were, for the most part, given away free of charge. S.T.O.P. was not engaged in the promotion of any athletic activity whatsoever, nor did S.T.O.P. sell any merchandise displaying Olympic designations. Thus, the court held that S.T.O.P.'s use of Olympic designations was not even within the ambit of section 380(a) (489 F.Supp. 1121).

In sharp contrast to the activities of S.T.O.P., SFAA is organizing an international Olympic Games (Brown Decl., p. 2), involving Olympic sports and events (Waddell Decl., p. 11), promoting the sale of Olympic souvenirs, referring to fund-raising events as "Official Olympics Entertainment" (id., Exh. T), "Olympian celebration" (id., Exh. Y), "The Olympic Office," "Olympic Headquarters," "Olympic Flag Corps," the "Olympic Committee," the "offical Olympic T-shirt" and the "Olympic emblem" (Miller Aff., Exh. C, pp. 4-6; Waddell decl., Exhs. H, Z). The record is replete with references by defendants to themselves and their activities as Olympic in an *official* or authentic context. And Dr. Waddell was publicly reported as noting that "Gay" serves as no basis for defendants' competitions:

> "If he [Waddell] has his way, he'd remove the 'Gay' from this competition and the entire community or movement. *** 'I'd like to change it to People's Olympics. Please believe me that it will be an athletic competition and a means of self-fulfillment for everyday people doing everyday things' " (Preston Aff., Exh. A, p. 2).

Such activity clearly falls within the language of section 380(a) and should therefore be enjoined.

II. PLAINTIFFS HAVE MADE THE REQUISITE SHOWING OF CONFUSION.

Defendants' contention that there is no evidence in the

record that their use of the word "Olympic" has created any confusion is without foundation. It is based on a misunderstanding of the law and a disregard of the facts.

Section 380(a) makes actionable any use of the term "Olympic" or similar terms "*tending* to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the [USOC] *or* any Olympic activity" (36 U.S.C. § 380(a)(4)). The record is more than sufficient to show that the public would "tend to" believe that plaintiffs are organizing or sanctioning defendants' competition or are otherwise connected or associated with it. Defendants have used the "Olympic" terminology and symbols to promote an international human athletic competition; they have organized a series of events to occur over a period of several days; they have included Olympic ceremonial events, including the carrying of a torch, an opening parade, and closing ceremonies; participants will represent their countries or cities and march behind the flags of these at the opening and closing ceremonies; defendants have organized competition in Olympic sports; they have solicited contributions under the Olympic name; and they have sold goods and other materials under that name. Indeed, defendants admit that they are hoping to create "an Olympic-style format" (Waddell Decl., p. 2). These facts plainly meet the standard of section 380(a)(4).

The Lanham Act employs a "liklihood of confusion" test (*Golden Door, Inc.* v. *Odisho* (9 Cir. 1980) 646 F.2d 347, 351; *AMF, Inc.* v. *Sleekcarft Boats* (9 Cir. 1979) 599 F.2d 341, 353), a more stringent standard than section 380's "tending to cause confusion" standard. But contrary to defendants' suggestion, proof of *actual* confusion is not required in a trademark action (ibid.). Because of the difficulty in obtaining evidence of actual confusion, its absence is not dispositive; actual confusion is a significant factor only when such evidence exists (*AMF, Inc.* v. *Sleekcraft Boats*, supra, 599 F. 2d 353).

In determining the likelihood of confusion under the

Lanham Act, courts examine such factors as the strength of the plaintiff's mark or name, the similarity of the marks, the similarity of the products, the marketing areas and defendant's intent in selecting the mark (id., pp. 348-349). Under the undisputed facts of this case, there can be no doubt that defendants' use of Olympic terminology and symbols "created a strong impression to the average consumer that plaintiff sponsored or endorsed defendants' goods or services" (*Visa International* v. *Bankcard Holders of America* (N.D.Cal. 1981) 211 U.S.P.Q. 28, 40; see also *Golden Door, Inc.* v. *Odisho* (N.D.Cal. 1977) 437 F.Supp. 956, 963-964, affirmed (9 Cir. 1980) 646 F.2d 347).

Defendants erroneously contend that their use of the term "Gay" before "Olympic" sufficiently distinguishes their activities from plaintiffs' and eliminates the possibility of confusion. Precisely this type of contention was considered and rejected in *United States Jaycees* v. *San Francisco Jr. Cham. of Com.* (N.D.Cal. 1972) 354 F.Supp. 61, 76-77, affirmed (9 Cir. 1975) 513 F.2d 1226. The court found that the prefix did not obviate any potential confusion; "rather it is a significant source of such confusion" (id., p. 77).

Defendants' use of "Olympic" after they had been notified of plaintiffs' exclusive rights indicates that the confusion issue should be decided in plaintiffs' favor:

> "When the alleged infringer knowingly adopts a mark similar to another's, reviewing courts presume that the defendant can accomplish his purpose: that is, that the public will be deceived (*AMF, Inc.* v. *Sleekcraft Boats*, supra, 599 F.2d 354).

Dr. Waddell's own declaration notes that as far back as mid-1981 he learned that he could not use the term "Olympic" in SFAA's corporate name (Waddell Decl., pp. 4-5). Dr. Waddell's assertion that he did not believe SFAA was prevented from using "Olympic" in connection with SFAA's activities is belied by his December 26, 1981 letter to USOC requesting permission to use Olympic terminology (Miller Aff., Exh. B). Throughout the communications that fol-

lowed, plaintiffs consistently asserted their exclusive right to Olympic terminology (Miller Aff., Exhs. D, F, H; Kline Decl., Exhs. B, D). Yet defendants resumed their use of Olympic terminolgy in full knowledge of these facts (Waddell Decl., pp. 4-7). Under the rule set forth in *AMF*, defendants are precluded from arguing that no confusion exists.

III. DEFENDANTS HAVE NO FIRST AMENDMENT RIGHT TO INFRINGE PLAINTIFFS' MARKS.

Defendants erroneously contend that plaintiffs' efforts to enforce their rights to the term "Olympic" constitute a violation of defendants' First Amendment right of free speech. The answer to this contention is that (1) no First Amendment rights are involved here, and (2) no state action is present.

As we argued in our initial memorandum (pp. 12-13), the speech involved in this case is *commercial* in nature and may properly be enjoined by this Court. Plaintiffs are not attempting to enjoin the event, the dissemination of any advertising or conduct of the Gay Games; they are simply asserting the rights granted to them by Congress to control the use of "Olympic." For the reasons cited in our initial memorandum, no constitutional guarantees are infringed by this action.

Indeed, defendants' theory would preclude every trademark or copyright holder from ever making a valid claim of infringement. This is simply not the law:

> "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed" (*Giboney* v. *Empire Storage Co.* (1949) 336 U.S. 490, 502, quoted with approval in *California Transport* v. *Trucking Unlimited* (1972) 404 U.S. 508, 514).

A second, independent reason for rejecting defendants' claim is that no state action is present. In *DeFrantz* v. *United States Olympic Com.* (D.D.C. 1980) 492 F.Supp. 1181,

various athletes attempted to enjoin the USOC from implementing its resolution, in the wake of the Soviet invasion of Afghanistan, not to send a United States team to the 1980 Summer Olympic Games in Moscow. Plaintiffs claimed, inter alia, that this resolution abridged their constitutional rights. After analyzing the Amateur Sports Act and the nature of the USOC, the court held that no governmental act or "state action" was present (id., pp. 1193-1194). The result can be no different here.

The fact that an injunction is sought from this Court does not transform the activity into state action. Courts have routinely held that judicial protection of property rights such as trademarks and copyrights does not constitute the requisite governmental action for a claim of constitutional infringement (see, e.g., *Interbank Card Ass'n* v. *Simms* (M.D.N.C. 1977) 431 F.Supp. 131, 133). Accordingly, no state action is present here.

IV. DEFENDANTS' CLAIM OF DISCRIMINATORY ENFORCEMENT IS SPECIOUS.

Defendants claim that they are being singled out for "selective enforcement" of plaintiffs' rights, but they offer no probative evidence on this point and have not cited any case establishing this assertion as a defense to this action. Indeed, the applicable rule of law is to the contrary, as is the factual record in this case.

The established rule in trademark law is that an owner "is under no obligation to bring actions against all infringers of its mark in order to preserve its right to bring an action against [the instant defendant]" (*McNeil Laboratories* v. *Am. Home Products Corp.* (D.N.J. 1976) 416 F. Supp 804, 808; see *Fleischmann Distilling Corp.* v. *Maier Brewing Company* (9 Cir. 1963) 314 F.2d 149, 160, certiorari denied (1963) 374 U.S. 830). This Court held that the existence of other infringers "against whom plaintiffs have not instituted legal proceedings is irrelevant to this Court's consideration of whether injunctive relief should issue" (*United States Jaycees* v. *San Francisco Jr. Cham. of Com.* (N.D.Cal. 1972) 354

F.Supp. 61, 73-74, affirmed (9 Cir. 1975) 513 F.2d 1226; see also *Visa International* v. *Bankcard Holders of America* (N.D.Cal. 1981) 211 U.S.P.Q. 28, 40). Accordingly, the existence of outside infringers is no defense to plaintiffs' action.

To the extent that courts are willing to consider the existence of other infringers, they will do so only with respect to the issue of whether outside uses have so diluted the mark that it is no longer entitled to protection, a defense not raised by defendants here (see *Chips 'N Twigs, Inc.* v. *Chip-Chip, Ltd.* (E.D.Pa. 1976) 414 F.Supp. 1003, 1017). The mark owner will be in the clear if it has attempted to protect its mark from "commercially significant" infringements (*Playboy Enterprises, Inc.* v. *Chuckleberry Pub.* (S.D.N.Y. 1980) 486 F.Supp. 414, 423):

> "The owner of a mark is not required to police every conceivably related use—thereby needlessly reducing non-competing commercial activity and encouraging litigation—in order to protect a definable area of primary importance" (id., pp. 422-423).

Thus, Playboy magazine's failure to enforce against Playgirl and other publications outside the "male heterosexual sex-oriented magazine market" did not estop it from enforcement against a competitor called Playmen.

The application of the dilution or abandonment doctrine to this action is doubtful in light of Congress' explicit protection of Olympic terminology and symbols in the Amateur Sports Act. In any event, the record is clear that plaintiffs have vigorously acted to protect Olympic terminology in the "commercially significant" area, including use by commerical enterprises and in human athletic competitions (Rowan Decl., p. 2). Further, defendants' assertion that plaintiffs have not previously brought litigation against an infringing group is flatly untrue (Kline Supp.Decl., pp. 1-2). The fact that plaintiffs have successfully enjoined the "Golden Age Olympics" (id., Exh. J) disposes of defendants' assertion that this lawsuit is the product of bias against

homosexuals. The assertion is irrelevant, as well as untrue. But what makes defendants' conducts here all the more aggravated is that they *knew* of USOC's efforts to police unauthorized use of Olympic terminology and symbols. Dr. Waddell admits that he knew USOC objected to athletic competitions called "Police Olympics" and "Armenian Olympics" (Waddell Decl., pp. 7, 10). Under these circumstances defendants can claim no comfort in the fact that others too may have infringed plaintiffs' rights.

V. THE NATURE OF THE INJURY IS SUFFICIENT TO WARRANT INJUNCTIVE RELIEF.

Defendants argue that plaintiffs have not shown how they will be injured by defendants' infringement of the Olympic terminology and symbols. This argument ignores the reality of trademark infringement cases, where the appropriation itself constitutes the injury for which injunctive relief is appropriate. Creating as it does confusion as to sponsorship and sanctioning, the infringement plainly warrants issuance of an injunction. So too, under section 380(a) the range of statutory protection extends not only to USOC sponsorship but to "any Olympic activity." "Olympic activity"—at a minimum—includes not just The Olympic Games, but the Pan American Games (36 U.S.C. § 374), the Special Olympics for handicapped Americans, the Junior Olympics and the Explorer Olympics for young Americans (Miller Aff., p. 2), plus of course those contests and the pageantry uniquely identified with The Olympic Games.

Courts have uniformly recognized the fact that irreparable injury attends trademark infringement (*Visa International* v. *Bankcard Holders of America* (N.D.Cal. 1981) 211 U.S.P.Q. 28, 38 and cases cited). Because of a name's unique funciton in representing intangible assets like reputaion and good will, "[t]he fact that plaintiff has had the symbol of its reputation placed in the hands of another is irreparable injury" (id., p. 39). As a result of defendants' plain infringement, the requisite irreparable injury has been established here.

But defendants here do more than trade on plaintiffs'

names, reputation and good will. The bulk of the funds used to support United States participation in The Olympic Games and Olympic activities are raised through USOC's authorization and licensing of Olympic terminology and symbols (Miller Aff., p. 1). During the present quadrennium, approximately $40 million will be raised in this manner (id.). Defendants compete directly with that endeavor and authorize use of Gay Olympic terminology to raise funds by endorsements in advertisements (Walker Decl., Exh. B). Defendants hope to raise $250,000 (Waddell Decl., p. 8) in the same and like ways using Olympic terminology and symbols—entertainments (id., p. 9), sales of posters, buttons, t-shirts (Petersen Decl., p. 3), basketball games and musicals (Loberg Decl., p. 2) and the like. The injury to plaintiffs is thus direct *and* irreparable.

VI. DEFENDANTS' APPARENT CLAIM OF LACHES IS UNAVAILING.

Defendants appear to contend that injunctive relief should be denied because plaintiffs have been dilatory in seeking legal redress. The laches argument is without merit.

The equitable defense of laches involves much more than mere delay in instituting legal action. The Ninth Circuit has held that while mere passage of time will not constitute laches:

> "[I]f the passage of time can be shown to have lulled defendant into a false sense of security, and the defendant acts in reliance thereon, laches may, in the discretion of the trial court, be found" (*Friend* v. *H.A. Friend and Company* (9 Cir. 1969) 416 F.2d 526, 533; see *Carl Zeiss Stiftung* v. *Veb Carl Zeiss Jena* (2 Cir. 1970) 433 F.2d 686, 704, certiorari denied (1971) 403 U.S. 905).

In *Golden Door, Inc.* v. *Odisho* (N.D.Cal. 1977) 437 F.Supp. 956, 968, affirmed (9 Cir. 1980) 646 F.2d 347, Judge Schwarzer held that laches requires passage of time plus "inexcusable delay which prejudices the defendant." If the plaintiff is not aware of the facts giving rise to his cause of

action, he will not be barred. Moreover, if the infringement is clear, injunctive relief will not be denied because of laches (but the delay may preclude relief in the form of accounting and damages).

The record in this case shows that the delay, if there was one, was induced by SFAA. On January 18, 1982—after USOC's protest of defendants' use of "Olympic"—Dr. Waddell wrote USOC's executive director: "We have, as an interim measure, blocked out the term 'Olympic' and in all subsequent printed materials will substitute the term 'Athletic' " (Miller Aff., Exh. E). Although the materials did not come to USOC's attention until later, it appears that defendants did in fact stop using "Olympic" (see Kline Decl., Exh. E—items refer to "Gay *Athletic* Games"), a fact Waddell now concedes (Waddell Decl., p. 7).

Later, on January 26, 1982, Dr. Waddell wrote a more comprehensive letter outlining SFAA's position, but still indicated:

> "Until this controversy can be definitively resolved, we of San Francisco Arts and Athletics, Inc., are making every reasonable effort temporarily to *suspend and avoid use* of the term 'Olympic' in our non-profit organization's activities to promote and plan the Games" (Miller Aff., Exh. G).

Interestingly, the Waddell January 26 letter goes on: "A definitive resolution of this controversy about our use of the term 'Olympic' is *urgently needed* by us" (emphasis in original). Waddell then threatened legal action if an informal resolution could not be worked out (Miller Aff., Exh. I, p. 2). USOC refused to concede (Kline Decl., Exh. B). SFAA's lawyer, Mary Dunlap, followed up with a letter denying any agreement to stop use of "Olympic" and claiming that enforcement of the Amateur Sports Act against SFAA would work "gross abridgments of the First Amendment" (Kline Decl., Exh. C). Ms. Dunlap also claimed that USOC and its officers were acting "under color of federal law" and denying SFAA Fifth Amendment equal protection rights.

But Ms. Dunlap made an offer in settlement to footnote all "Gay Olympics" materials as not associated with USOC (Kline Aff., Exh. C). USOC responded through its counsellor Mr. Kline that Ms. Dunlap's proposal was unacceptable and stating that it regarded SFAA as bound by the prior agreement of Dr. Waddell not to use Olympic terminology and symbols. There matters stood until USOC learned in early June that SFAA had resumed use of "Gay *Olympic* Games" (Miller Aff., p. 5).

The record reveals that plaintiffs have at all times asserted their exclusive rights in the protected terms and marks. This case thus differs from those where defendants have been lulled into a false sense of security by a plaintiff's silence or tacit consent to a mark's use. The delay, if any, was in bringing the matter to litigation; but it was occasioned by defendants' apparent decision to stop using the term. No facts indicated that plaintiffs acquiesced, expressly or implicity, in defendants' use of the term "Olympic." Accordingly, defendants' laches claim must fail. Indeed, defendants knew that plaintiffs object not only to defendants' unauthorized usages of Olympic terminology and symbols but to other unauthorized usages as well (Waddell Decl., pp. 7, 10).

CONCLUSION.

For the foregoing reasons, and for the reasons set forth in our Memorandum in Support of a Temporary Restraining Order, plaintiffs' request for a preliminary injunction should be granted.

Dated: August 18, 1982.

(Names omitted in printing.)

By: Robert A. Gordon (Signed)
Attorneys for Plaintiffs
International Olympic Committee and
United States Olympic Committee

(Certificates of Service omitted in printing.)

File Date: August 19, 1982

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

INTERNATIONAL OLYMPIC COMMITTEE, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF SWITZERLAND; UNITED STATES OLYMPIC COMMITTEE, A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE UNITED STATES OF AMERICA,

PLAINTIFFS,

VS.

SAN FRANCISCO ARTS & ATHLETICS, A CALIFORNIA CORPORATION; THOMAS F. WADDELL,

DEFENDANTS.

Hearing on Preliminary Injunction:
Reporter's Transcript of Proceedings
Thursday, August 19, 1982
Reported by: Robert L. Rogers, CSR

APPEARANCES

For the Plaintiff:

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August 19, 1982

The Clerk: C-82-4183 International Olympic Committee, et al., versus San Francisco Arts & Athletics, a California corporation, et al., for hearing on Plaintiffs' Motion for Preliminary Injuction.

Will counsel state their appearance to the Court for the record.

Ms. Dunlap: Mary Dunlap for the Defendant, and Dr. Thomas Waddell.

Mr. Walker: I'm Ron Walker for the Plaintiffs. This is my assistant, Robert Gordon, and Mr. Richard Kline of the Washington, D.C., bar.

The Court: You are the moving party.

Mr. Walker: That is correct, your Honor. This is, as you know —

The Court: Did you call the case?

The Clerk: Yes, I did.

Mr. Walker: As your Honor is fully aware, this is before your Honor on an Order to Show Cause re Preliminary Injunction. The Order to Show Cause was issued by Judge Conti 10 days ago, and in so doing Judge Conti had lengthy proceedings, unusually lengthy, I believe, for a temporary restraining order proceedings. I requested and obtained a transcript of those proceedings. I belive Ms. Dunlap did as well. I don't know if those have been made available to the Court, but I would submit those to your Honor.

Both parties were heard at length before Judge Conti, and he determined to issue the TRO. Since that time, your Honor, we don't believe that anything has been shown by the responding parties to suggest why a preliminary injunction should not issue in this matter. Nothing new to preclude —

The Court: Now, as I understand it, you seek to restrain the use of the name. You don't seek to restrain the actual performance or exhibition of competition.

Mr. Walker: That is correct, your Honor.

The Court: There was a suggestion in some of the papers filed that the declarant might have been under the impression that you were seeking to prohibit the competition — the performance.

Mr. Walker: Not at all. Our interest is solely in what we regard as the unauthorized use of Olympic terminology and Olympic symbols. We have no interest in stopping the Games, in hindering the Games in any way.

In fact, when we first learned of the Games, the executive director of the U.S. Olympic Committee believed that he had forestalled the use of "Olympics," and having done so, wished Dr. Waddell, who is the organizer of the Games, well and gave him best wishes for success in the Games.

So we think that's very important in balancing the equities which your Honor has to do in considering whether to issue a preliminary injunction. The objectives which the Defendants seek to foster by these Games, that is, to demonstrat that homosexual people can participate and do participate fully and well in athletic events, it's an effort to bring dignity to the gay community. None of that will be interfered with by any of the relief that we are seeking from your Honor this morning on the preliminary injunction. We seek simply to stop the unauthorized use of "Olympic" and the Olympic symbols.

The Court: Let's look at the statute. I take it that you bring this action under Section 380(A)(4)?

Mr. Walker: That is correct, your Honor.

The Court: And with respect to the showing as to the word "Olympic," to cause mistake, tending to cause — Well, let's read it:

"Without the consent of the corporation, any person who uses, to promote any athletic performance or competition, the words "Olympic," or any combination or simulation

The Court *(cont.)*: thereof tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the corporation or any Olympic activity shall be subject to a suit."

What is the showing that there is a likelihood to cause mistake or to suggest a connection with the Olympic activity?

Mr. Walker: First, let me point out, your Honor, that the showing under Section 380 is not "likely to confuse," but "tending to cause confusion." It is the same showing that exist under Section 1125 of the Lanham Act. It is a more relaxed showing than is typically the case in a trademark infringement action — tending to show confusion, mistake or deception. And the confusion and deception and mistake is with not only the activities of the United States Olympic Committee, but with any Olympic activity. And in the record, your Honor, it is noted that among the Olympic Activities of the United States Olympic Committee are the Special Olympics for handicapped people, the Junior Olympics for young people, the Explorer Olympics, the Olympic Trials. There are a variety of Olympic events which are qualified by some word either in front of them or in connection with them. And so simply saying "Gay Olympics" does not distinguish the activities of the defendants in any way from the activities of the United States Olympic Committee.

The Court: Well, with respect to those others, did your organization give permission?

Mr. Walker: We give permission. In fact, with the ones I mentioned, we are sponsors of them. The Special Olympics is part of the Olympic program.

The Court: And under the statute you can do that?

Mr. Walker: Under the statute we are required to do that with respect to the Special Olympics for handicapped persons.

The Court: So that was written into the Act?

Mr. Walker: That was written into the Act. We are fulfilling the statutory mandate by conducting a Special

***Mr. Walker** (cont.):* Olympics, as is indicated in Mr. Miller's declaration. Likewise, with the Junior Olympics and the Explorer Olympics, they are all part of the same program.

Now, with regard also to confusion, I think it is fair to point out that the defendants have represented that the only time they have used Olympic terminology is in connection with the word "Gay." They make that statement in their Memorandum. But, your Honor, there are numerous instances in the material that we have presented which demonstrate references by the defendants simply to "Olympics."

For example, in Exhibit C to Mr. Miller's Affidavit, which is a newsletter of the defendants, there is reference to the Olympic emblem, the first Olympic poster, Olympic T-shirt package, official Olympic T-shirt, "Diving in the Olympic Games depends upon us being able to acquire use of the San Francisco University pool," special Olympic Games benefits, the Olympic Committee, Olympic Flag Corps, Olympic Headquarters, the Olympic office. And by those references they are meaning the defendant's headquarters on Castro Street. So they have not limited their use of Olympics simply in connection with the word "Gay."

But even if they were to do so, there is still confusion and the possibility of a mistaken association or identification with the activites of the U.S.O.C. One other thing I want to point out —

The Court: Let's focus for a moment on the element of irreparable harm. Perhaps you should finish your point.

Mr. Walker: I want to make one other point with reference to Section 380. It is not simply confusion and mistake. There is also the element of deceit. And there is the principle in trademark law, which the Ninth Circuit outlined in a case entitled *AMF, Inc., versus Sleek Craft Boats*, which is reported at 599 Fed. 2d. 341, your Honor. And it has to do with the matter of intent. And the principle is stated rather succinctly by the Court. Let me just read it.

Mr. Walker *(cont.)*: "When the alleged infringer knowingly adopts a mark similar to another's, reviewing courts presume that the defendant can accomplish his purpose, that is, that the public will be deceived."

Now, I direct your Honor's attention to Dr. Waddell's own declaration in which he states that when San Francisco Arts & Athletics, the corporate defendant, sought to register with the Secretary of State back in the middle of 1981, it was told by the Secretary of State of California that it could not use the word "Olympic" in its corporate name as it had intended to do. He said, "Well, we went on and thought we could use it in our activities." But that came to light to the U.S.O.C., and immediately the U.S.O.C. asked the defendants to refrain from the use of "Olympics." There was an exchange of correspondence. This is all set out in the declarations, including Dr. Waddell's declaration.

Nonetheless, the defendants persisted, even though at one point they agreed to drop the use of "Olympics." And they did so. They printed materials, as he now admits, for a time in connection with their activities dropping any reference to "Olympics." When the lawyers got involved, they resumed the use of it.

We believe, your Honor, this indicates the kind of intentional infringement to which the Ninth Circuit addressed themselves in the *AMF* case, and it is another basis upon which that part, the deceit part, of Section 380 should apply here.

Now, your Honor asked about irreparable injury. As Mr. Miller explains in his affidavit, your Honor, the life blood of the U.S. Olympic Committee is through corporate authorizations and licensing of our trade name, "Olympic," as well as the Olympic symbol. I could present to you, your Honor, numerous instances where the Olympic symbol, the five rings, the Olympic torch, or the name "Olympic," has been used as a fund raising device. During the current four-year period the United States Olympic Committee expects to raise forty million dollars, the bulk of its income, to support

Mr. Walker *(cont.)*: United States' participation in the Olympic Games. If the U.S.O.C. permits unauthorized use, such as the kind we have here today, it completely diminishes and destroys the value of the authorizations and licensings which the U.S.O.C. makes to corporations for use of the Olympic terminology and symbols. And without that, the funds necessary to support American athletes in the Olympic Games cannot go forward — would not be raised.

By contrast, as we indicated at the outset, we are not seeking to stop the defendants in any way from conducting their activities. They can go on and conduct their games in the manner in which they decide is most suitable to their purposes. All we ask is that they refrain from the use of Olympic terminology and symbols.

The Court: Thank you.

Ms. Dunlap.

Ms. Dunlap: Your Honor, first of all, I'd like to politely register a protest. Among Judge Conti's orders made in conjunction with the termporary restraining order was an order that the plaintiffs would serve all of their papers last Tuesday, the 10th. We would serve our opposition on Monday. My doorstep has been covered with papers, it would seem, ever since, including supplemental declarations filed by the plaintiffs on Monday, and a memorandum in reply to our legal points and authorities served at six p.m. last evening. Even so, the content of all of this paper filed by these plaintiffs fails to show the Court, (1) that there is any likelihood of proving that these defendants have violated either the Amateur Sports Act in its protection of the word "Olympic," or the trademark law and the antidilution law, also relied upon by the plaintiffs.

It appears that what the plaintiffs ask this Court to do is assume that the use of "Olympic" in conjunction with an athletic activity per se violates the Amateur Sports Act and Section 380, in particular. Had that been the purpose of Congress, Congress would not have used the language, "tending to confuse, to cause mistake, to deceive," and so

Ms. Dunlap *(cont.)*: forth. There would have been no need, for it would have been the purpose of Congress simply to bestow upon the U.S. Olympic Committee an absolute entitlement to the term.

I would submit that such an act on the part of Congress would on the face of it have been subject to considerable challenge based on the First Amendment. Instead, Congress carefully tailored the test in Section 380 to correspond to that balance within trademark law that requires a showing of confusion, mistake, or deceit in order to prevent a so-called infringer from using a word.

The record may be somewhat confused on this point, but I would like to clarify something. The defendants in this case at no stage have used any symbol, emblem, insignia, trademark, or name, other than the word "Olympic" in the context of the Gay Olympic Games. Counsel's point about various references to Olympic offices and so on is not well taken.

If your Honor will look at the very documents and exhibits pointed out by counsel, each and every one of them contains the word "Olympic" in the context of the Gay Games, and with recitals of the political and philosophical purposes of this organization in promoting those Games in its nonprofit capacity.

Counsel has also failed once again to respond to the point that Judge Cannella did have an opportunity in the *S.T.O.P.* case to interpret the meaning of the Amateur Sports Act and of Section 380 in particular. Judge Cannella made the point there, and made it plainly, that the purpose of that section was to prevent others from seeking to register "Olympic" as a trademark. There has been no proffered registration of Olympic as a trademark in the case at bar.

Moreover, the point made by Mr. Kline's supplemental declaration on Monday that an organization using the word "Golden Age Olympics" has somehow been enjoined by the U.S. Olympic Committee must be more carefully scrutinized in light of the submission of Mr. Kline in that regard. One

***Ms. Dunlap** (cont.):* discovers, in looking at the exhibit to which he refers, that what happened was a consent decree growing out of the Golden Age Olympics' effort to register "Olympic" as a trademark. It was Congress' intent, as Judge Cannella interpreted it in the *S.T.O.P.* case, to prevent such registrations. There is no registration issue in the case at bar. There has been no effort by these defendants in any way to step upon Congress' intent to permit the U.S. Olympic Commitee to maintain the exclusive registration, after September, 1950, to the word "Olympic." Rather here the word "Olympic" has been used in the course of promotion of athletic competition in a manner that these plaintiffs have at no point shown, or made a suggestion of showing, confuses or tends to confuse, tends to cause mistake, tends to deceive.

Let me make one observation about this business of deceit. The word "deceit" must have some meaning. The word "deceit," as I understand it, means to try to fool or falsely persuade someone. There is not one iota of evidence in this record, nor will there ever be, that these defendants have somehow set out to deceive the world, to suggest falsely that they are in some fashion related to the U.S. Olympic Commitee.

In their reply memorandum yesterday the plaintiffs cite a case in the Ninth Circuit, to which I want to draw the Court's attention, for the point that the use of the term "Gay" in conjunction with the use of the term "Olympic" does not sufficiently distinguish that use from the U.S. Olympic Committee's protected uses. That case, which is *U.S.J.C.'s versus San Francisco Junior Chamber of Commerce*, involved, as I read it this morning, a disaffiliated subgroup of the United States Junior Chambers of Commerce who had, after not paying dues and departed in its philosophy from the parent organization, decided, nonetheless, to keep its name. The Court found, in fact, that there was confusion in the public's mind. That fact was based, in part, on the pre-existing relationship between the plaintiff and the defendant.

Ms. Dunlap *(cont.)*: The Court also found, unlike the case at bar, I submit, that the phrase "Junior Chamber of Commerce" is not a generic or descriptive term.

I would contrast here the ancient Greek history of the term "Olympic" in terms of its having preceded Congress' actions with relation to the U.S. Olympic Committee by thousands of years. So the *J.C.*'s case cited by plaintiffs here, in lieu of a showing of confusion as a legal point, perhaps doesn't even stand for the proposition for which it is cited in their brief.

Onward from the law and from the statutory misinterpretation of that law and misapplication of that law that defendants believe is being urged upon this Court, if the Court were to accept the position of the plaintiffs that they have an absolute entitlement to the use of the term "Olympic," regardless of the nature of an organization that might use it, regardless of the lack of confusion, regardless of the nonprofit and political nature of that organization's activities, if this Court were to accept that interpretation, then the very constitutional issues which were avoided in the *S.T.O.P.* case would have to be decided. And we submit that the matter of an injunction in this case, imposing what amounts to a prior restraint upon the use of the term "Olympic," is no small matter, constitutionally speaking. It cannot be disposed of in a footnote or a slight reference to the proposition that in most trademark cases the action of issuing an injunction is not government action. Here we have an entity bestowed by Congress with powers that are substantial over other organizations, given the opportunity to use the public domain for the raising of funds and the seeking of public resources.

The action of a court in enjoining the use of a word in this context is an action which can only be described as governmental action pursuant to the First Amendment. The argument of the plaintiffs here as to injury at all points presume this tendency to confuse, presume the misappropriation of goodwill, and in no part of these many declarations filed over a period of a week and a half, in no part is any

***Ms. Dunlap** (cont.):* effort made to make the requisite statutory showing under the Amateur Sports Act. The reply memorandum of the plaintiffs in this case argues that the defendants here have not shown, nor even suggested in any strong or convincing way, that there has been discriminatory enforcement. I submit to the Court that Dr. Waddell's affidavit establishing the long run and international nature of the Police Olympics, which is known to these plaintiffs, which has been conducted, if you will, under their noses for years, points up in a strong way, in a clear way, that there has been a selection of targets in this litigation.

Whether the plaintiffs in this case seek to have this Court presume confusion for purposes of using this injunction in other litigation, or whether, on the other hand, these plaintiffs intend never to sue any other athletic competition for the use of the term "Olympics," their legal and factual test for injunctive relief do not correspond with the statute and with the showings required in this Circuit for the issuance of an injunction.

The injury, I submit, is not shown of record and is only capable of being found if the Court presumes the legal violation as to which these plaintiffs have not made a showing. Meanwhile, on the other side of the scales tipping toward the floor is the injury to these defendants, which is massively documented in the declarations submitted on Monday. The harm to them consists of far more than having to cross out a word on a T-shirt, or a poster, or a button. It consists, in part, in the hand of the law reaching into these activities of these individuals and stripping away from them the ability to use a word that, we submit, is in the public domain, is generic and is descriptive.

The harm to the public interest, I submit, is even greater because in this case the U.S. Olympic Committee, if it were to receive injunctive relief, will have sidestepped legal tests, failed to make factual showings, undermined the legal rigors of a motion for preliminary injunction in terms of the showings required to be made and will have deprived the

***Ms. Dunlap** (cont.):* public of the kind of careful balancing between a meaning of a trademark law and the meaning of First Amendment rights that the federal forum requires.

The Court: Thank you very much.

Do you desire to reply?

Mr. Walker: Very briefly, if I might, your Honor.

First of all, with respect to Ms. Dunlap's First Amendment point, the First Amendment does not preclude the copyright laws; it doesn't preclude the trademark laws; it doesn't preclude antitrust laws or securities law violations. All of this conduct is carried out by speech. It's commercial speech and it can be regulated, I submit, at this point —

The Court: She argues that there is a generic term and that Congres has attempted to give you exclusive use of that term.

Mr. Walker: She is arguing, I gather, that the statute is unconstitutional.

The Court: Yes.

Mr. Walker: The statute has been in effect, or rather the U.S. Olympic Committee's right to use Olympic and Olympic terminology and symbols has been in effect since 1950.

The Court: The statute was enacted in 1950.

Mr. Walker: The right of the U.S.O.C. was enacted in 1950, and then it was amended in 1978 by the Amateur Sports Act of 1978. From its initial enactment in 1950, it was a criminal violation to use Olympic terminology and symbols. And that was changed in 1978 to provide a right of action in the United States Olympic Committee under the Lanham Act. The violation is set forth in the Amateur Sports Act, but the U.S.O.C. is given the remedies under the Lanham Act, the Trademark Act.

We don't think, your Honor, that this is unconstitutional in any way. The Court addressed that, to the extent I think any Court has addressed it, in the *De Franz* case, which is cited in our papers and is referred to by Ms. Dunlap. There the issue was whether there was unconstitutional infringement of rights of athletes to participate in the 1980 Summer

***Mr. Walker** (cont.)*: Games at Moscow when the U.S.O.C. decided to not send a U.S. team. The athletes charged that the U.S.O.C. didn't have that authority; that it was an unconstitutional infringement of their right to participate in the Games. And the Court had no difficulty in disposing of the constitutional challenge to the Amateur Sports Act in that context.

Now, I grant you that challenge was a somewhat different one in a different context, but the same arguments of state action were raised in the *De Franz* case that Ms. Dunlap raises here.

Regarding the generic nature of the term, the term "Olympics" has been around for a long time, but generic words can acquire trademark significance. There has been nothing unconstitutional about that. It depends upon usage. And here we have a situation where Congress decided that the use of Olympics had become so indelibly interlinked in the public's mind with the Olympic Games and the activities related thereto, that it ought to afford to the United States Olympic Committee the trademark remedies, which it gave them in the Amateur Sports Act.

Ms. Dunlap made some point about the lack of evidence, confusion, or mistake. As your Honor knows, evidence of actual confusion in a trademark case is not necessary. It often cannot be brought to court. It is difficult to prove, in any event. What is emphasized by the courts are the similarity between the goods, the similarity of the activities in the markets in which they operate. We are dealing here with activities of the defendants which bear a very, very strong resemblance to the activities of the plaintiffs.

The defendants plan to put on a quadrennial event, one every four years. They include athletic events which are the Olympic sports — swimming, diving, wrestling, volley ball, basketball, many others. The Games are international in scope. Even their literature say they expect individuals from 12 countries, many cities. The Games are going to be started by the lighting of an Olympic torch, which is being carried

Mr. Walker *(cont.)*: across the country. The Games and events are nonprofit activities, as, indeed, are the activities of the United States Olympic Committee. The opening ceremonies employ Olympic flag corps. In fact, the schedule, which is attached as Exhibit A to Ms. Dunlap's declaration, bears a very strong resemblance to the opening ceremonies of the Olympic Games. And, finally, there is one point on which erroneously the defendants try to distinguish the purpose of their events from the Olympic Games. Dr. Waddell in his declaration states of page 3:

> "We have an entirely different philosophy than the traditional Olympic Games in that we are emphasizing participation and cooperation and recreational competition as opposed to emphasizing winning and nationalism."

Well, Dr. Waddell participated in the 1968 Games at Mexico City, and he perhaps heard the Olympic Creed which was laid down by the founder of the modern Olympics in 1894, Baron de Courtin. He said, in words bearing a striking resemblance to the words enunciated by Dr. Wardell:

> "The most important thing in the Olympic Games is not to win, but to take part; just as the most important thing in life is not to triumph, but to struggle."

So even the declared purposes of these Games bear a striking resemblance to the Olympic Creed, your Honor. And the use, therefore, of Olympic terminology and Olympic symbols in their connection, we believe, is ample evidence of confusion and possible misidentification with the activities of the plaintiffs.

The Court: All right. Anything further? Does the matter stand submitted?

Ms. Dunlap: We have a number of items here that were too bulky to be submitted as exhibits. They are not documentary in nature. I wish to show them to counsel for the plaintiffs, and then submit them to the Court for its safe keeping. They seem to be our only copies of these particular items.

Mr. Walker: We have others as well, your Honor.

The Court: Those are the official —

Ms. Dunlap: The shirts and patch are shirts and a patch from Olympic Games conducted, respectively, by the police and the Armenians referred to in Dr. Waddell's affidavit. These posters are all the various posters produced for and on behalf of the Olympic Games. So your Honor will see what is being used and what isn't being used by way of supposedly similar symbols, insignias, and so on. That's our purpose for submitting them.

Mr. Walker: Let me just address that, if I might, for the record, and that is simply this: The evidence of other infringements is not any defense to a trademark action at all. The fact that others may have infringed on our mark doesn't help the defendants one whip. But, secondly, our affidavits show very conclusively that the plaintiffs have been very vigilant in policing their marks. Our papers and declarations show that there have been 200 and some commercial applications which the U.S. Olympic Committee has pursued. There have been 15 instances of athletic competitions in which we have sought to refrain — caused the parties to refrain from use of Olympic terminology, including the Police Olympics and the Senior Olympics, both of which are presently pending matters.

Mr. Kline refers in his declaration to the action which was brought and the injunction obtained against the Golden Age Olympics involving athletic contests for older people. So, they are wrong, first, on the law, and they are wrong, secondly, on the facts. We have been vigilant.

The Court: Did you say there is an action pending with respect to the Police Olympics?

Mr. Walker: There is not a legal action pending. That's a matter —

(Laughter from the audience.)

The Court: Just a moment. I'll have to clear the Courtroom if you insist on this behavior. Go ahead.

Mr. Walker: There are negotiations between the Senior

Mr. Walker *(cont.):* Olympics people and the Police Olympics people. There has been a successful infringement action brought against a group that was sponsoring something called the Golden Age Olympics.

The Court: That's the consent decree?

Mr. Walker: That is the consent decree, that's correct. So we have been vigilant in policing this mark. And the claim of discrimination here just doesn't hold up, your Honor.

Ms. Dunlap: Your honor, I would only ask that, in light of the fact that my clients are currently the subjects of a temporary restraining order, that we get some sense from the Court as to the Court's will in deciding these issues and this motion.

The Court: You will. It will be decided by noon tomorrow. The matter will be taken under submission.

Mr. Walker: May I ask, your Honor: Can I assume that the temporary restraining order is in effect until —

The Court: Yes, until tomorrow at noon.

Ms. Dunlap: Does your Honor wish us to appear at noon tomorrow?

The Court: No, I don't think that will be necessary.

Mr. Walker: Do you want proposed orders or proposed suggested findings, or anything of that character?

The Court: We may ask for that if we feel it is necessary. Thank you.

(Proceedings adjourned.)

(Reporter's certificate omitted in printing.)

File Date: August 20, 1982

INTERNATIONAL OLYMPIC COMMITTEE,
UNITED STATES OLYMPIC COMMITTEE,

Plaintiff(s),

vs.

SAN FRANCISCO ARTS & ATHLETICS,
THOMAS F. WADDELL,

Defendant(s).

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

C-82-4183 RFP

Order

This matter having been submitted to the Court for consideration and decision on the record and pleadings on file,

IT IS HEREBY ADJUDGED that plaintiffs' motion for preliminary injunction is GRANTED. Memorandum of Findings of Fact and Conclusions of Law to follow.

DATED: August 20, 1982

Robert F. Peckham (Signed)
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Order issued August 20, 1982

The order granting preliminary injunction is reprinted as Appendix 8, pages 91-127, of the Petition for Certiorari. (Note: That order is miscaptioned "United States Court of Appeals for the Ninth Circuit." It should be captioned "United States District Court for the Norther.. District of California.")

File Date: August 23, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Notice of Appeal

Pursuant to Rule 3 (a) of the Federal Rules of Appellate Procedure and 28 U.S. Code section 1292 (a)(1), notice is here by given that defendants SAN FRANCISCO ARTS & ATHLETICS INC. and DR. THOMAS WADDELL appeal from the preliminary injunction ordered by the U.S. District Court for the Northern District of California on August 20, 1982 in the above-captioned action.

Dated: August 23rd 1982

By: Mary C. Dunlap (Signed)
An Attorney for Defendants

File Date: August 23, 1982

(Names omitted, See J.A. 62, above)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(Title omitted.)

Defendants' Memorandum of Points and Authorities in Support of Emergency Motion for Order Staying or Dissolving Preliminary Injunction

I. INTRODUCTION

Where the court issuing a preliminary injunction relies upon an erroneous legal premise, or abuses its discretion, in issuing said injunction, the order is subject to being overturned on appeal. *Miss Universe Inc. v. Flesher*, 605 F.2d 1130, 1132-1133 and n.5 (9th Cir. 1979). In the instant case, defendants SAN FRANCISCO ARTS & ATHLETICS INC. (below, SFAA) and DR. THOMAS WADDELL (below, DR. WADDELL) contend that the District Court clearly erred in interpreting and applying relevant federal law, created unnecessary and serious constitutional abridgements of First Amendment rights by said misinterpretation of law, accomplished an invidious discrimination against a non-profit corporation and a volunteer working to overcome discrimination against gay and lesbian persons, and went outside the record in order to find "facts" to support the issuance of a preliminary injunction, after plaintiffs had *failed of record* to show (1.) that defendants were acting in violation of plaintiffs' statutory rights and (2.) that plaintiffs had not discriminated against defendants' "GAY OLYMPIC GAMES", while insulating others including the international "POLICE OLYMPICS" from similar litigative assault.

Defendants respectfully urge this Court to refer to the Memorandum of Defendants in Opposition to Plaintiffs'

Motion for Preliminary Injunction etc., filed below, that is "Exhibit B" to the Declaration of Mary C. Dunlap filed herewith, in support of this motion for an order staying or dissolving the preliminary injunction. Said Exhibit B contains extensive and complete legal analysis of the several points that are briefly summarized in this urgently prepared memorandum.

II. THE DISTRICT COURT ADOPTED ERRONEOUS LEGAL PREMISES IN INTERPRETING AND APPLYING THE AMATEUR SPORTS ACT OF 1978, 36 U.S. CODE SECTION 380(a)(4), TO DEFENDANTS AT BAR.

The portion of the Amateur Sports Act upon which plaintiffs relied below for their motion for preliminary injunction prohibits use by persons in trade, for sales, or in promotion of athletic performances of:

> "the words 'Olympic', 'Olympiad', 'Citius Altius Fortius', or any combination or simulation thereof *tending to cause confusion, to cause mistake, to deceive, or to falsely suggest a connection with the Corporation or any Olympic activity* . . .". 36 U.S. Code sec.380(a)(4). (emphasis added)

Plaintiffs below made *no showing* that defendants' use of the word "Olympic" in connection with the Gay Games tended or would tend to cause such confusion, mistake, deception or false suggestion. The only material presented in support of this point by USOC and IOC was a declaration of these plaintiffs' attorney, Mr. Vaughn Walker, baldly claiming the conclusion that defendants' use of "Olympic" in connection with the Gay Games did or would tend to cause such confusion, mistake, deception or false suggestion.

Yet the District Court found that plaintiffs in this action were likely to succeed on the merits of their unsupported claim for relief under 36 U.S. Code section 380(a)(4), by designing a presumption in plaintiffs' favor to that end. The District Court concluded:

> "...under the circumstances of this case, the court *may*

> *presume* that defendants' actions tend to cause confusion and mistake and tend to suggest falsely a connection between their athletic games and those of the USOC."
>
> (Exhibit A to Decl. M. Dunlap, p. 11 lines 7-10).
>
> (emphasis added).

Nothing in the statute empowered such a presumption. Nor does the relevant legislative history, reflecting a narrow Congressional purpose to prevent competitors from registering trademarks and tradenames with the term "Olympic" in them and undermining USOC's ability to sell its name and mark to raise money for Olympic activities, lend an iota of support to the legal presumption of confusion engrafted by the District Court, in favor of plaintiffs, in the order made below. See 36 U.S. Code sections 371 et seq.; House Report No. 95-1627, in U.S. Code Cong. & Admin. News pp. 7483, 7488, 7496 (1978); *see also*, discussion of legislative history of section 380 in *Stop the Olympic Prison v. U.S.O.C*, 489 F. Supp. 1112, 1119-1120 (S.D.N.Y. 1980).

In applying this legally unsupported presumption against defendants below, the District Court stated that

> "[b]ecause the analysis must necessarily be heavily factually oriented, the decision whether [to presume tendency to confuse etc.] must be made on a case by case basis."
>
> (Exhibit A to Decl. Dunlap, p. 11 lines 17-18).

But there was no "heavily factually oriented analysis" in the case at bar nor can the District Court have accomplished any such analysis, because plaintiffs at bar adduced *no facts* whatsoever showing a tendency to confuse, cause mistake, deceive or falsely suggest a relationship on defendants' part.

To the contrary, the District Court in the case at bar *reached beyond the record* to conclude that "...the long range goals of [SFAA and DR. WADDELL] is apparently to sever the games from their direct conection with the gay community altogether." (Exhibit A to Decl. Dunlap, p. 9 lines 19-21). For this erroneous and unsubstantiated

proposition, which is contradicted of record by the Declaration of Thomas Waddell filed in opposition to the motion for preliminary injunction (copy lodged with this Court), the District Court quoted and relied on an article from the San Francisco Chronicle that purported to paraphrase and quote Dr. Waddell. (Exhibit A to Decl.Dunlap, p. 9, lines 22-32). Dr. Waddell's own lengthy and distinct declaration under penalty of perjury, describing the distinct origin, nature, format and philosophy of the proposed "GAY OLYMPIC GAMES", which was in no part rebutted by any showing of plaintiffs, was simply swept aside by the District Court, in favor of an erroneous inference built upon an unverified newspaper article.

In *presuming* that the proposed "GAY OLYMPIC GAMES" label tends to cause confusion, mistake or false suggestion of a relationship with USOC or its activities, the District Court also emphasized that the Gay Games are open to participation by "both homosexuals and heterosexuals", (Exhibit A to Decl.M.Dunlap, p. 9 lines 16-17), and the District Court went on to suggest that if the "participants [were] limited to a special group or groups" (Exhibit A to Decl.M.Dunlap, p. 11 lines 13-14), its presumption as to tendency to confuse etc. might not apply. This part of the reasoning of the District Court is convoluted in the extreme, insofar as it implies that if SFAA and DR. WADDELL had discriminated on account of sexual orientation in defining participation in the Gay Games, or on some other basis, then such discrimination might somehow serve to distinguish the Gay Games from USOC and IOC activities.

According to plaintiffs, "...USOC...has authorized use of 'Olympic' to organizations which sponsor athletic competitions and events for handicapped persons (i.e., 'Special Olympics') and for youth (i.e., 'Junior Olympics' and 'Explorer Olympics')." (Affidavit of F. Don Miller Supp.Mo.T.R.O. etc., filed below and lodged herewith). This undisputed fact makes it difficult to imagine how defendants' narrowing of the group allowed to participate in the Gay

Games would serve to inject doubt into the presumption that the District Court architected against defendants, given that USOC itself has authorized use of 'Olympic' in behalf of those three (3) "special groups".

Moreover, the legal and policy implications of the District Court's reasoning as to "special groups" are untenable. If SFAA and DR. WADDELL did discriminate on account of sexual orientation in the participation criteria for the Gay Games, they would be in putative violation of California's civil rights laws, which have long been held to prohibit such discrimination. See Calif. Civil Code sections 51 et seq., cf. *In re Cox*, 90 Cal. Rptr. 24, 474 P.2d 992, 3 C.3d 205 (1970); Cal. Const. Art I, sec. 1 (guaranteeing a right of privacy against all persons who might invade same). More basically, such discrimination would directly contradict the proclaimed philosophy of SFAA, Dr. Waddell and others sponsoring and promoting the Gay Games, to wit., to overcome discrimination, not to perpetuate it. (See Declarations of Dr. Waddell and of other volunteers lodged herewith, filed below, in opposition to plaintiffs' motion for preliminary injunction etc.).

Furthermore, the openness of the participation policy as to the Gay Games should have served factually to *distinguish* the Games from USOC and IOC activities, given the poignant contrast between this inclusive policy and those organizations' elaborate and judicially cognizable systems of qualifying athletes for Olympic activity. By contrast to plaintiffs' systems of selecting participants in the Olympic Games, the Gay Games are open to any registrant or city team, regardless of prior training, ability or expertise, who desires to compete in the sports/events of billiards, bowling, softball, golf, powerlifting, rugby (women only), wrestling (men only), or in the traditional (Greek) olympic sports. (See Exhibits H and J to Decl.T. Waddell, filed below and lodged herewith).

In summary, the District Court created a presumption of tendency to confuse, etc., which is nowhere supported in law,

and then ignored the record facts in order to apply this judicially engrafted presumption against defendants. The letter and spirit of section 380 of the Amateur Sports Act of 1978 do not support the presumption created below, and the record facts do not afford its logical application against defendants, assuming *arguendo* that such a presumption could be legally justified.

III. THE DISTRICT COURT'S CONSTRUCTION AND APPLICATION OF SECTION 380 OF THE AMATEUR SPORTS ACT OF 1978 UNNECESSARILY CONFLICTS WITH DEFENDANTS' FIRST AMENDMENT RIGHTS OF FREE SPEECH AND ASSOCIATION, AND CREATES A CONSTITUTIONAL CLOUD OVER THE STATUTE ITSELF.

If the District Court had applied 36 U.S. Code section 380 as it was written and Congress intended it to be applied, plaintiffs would have been obligated to show *at least* that they are likely to succeed in their claim that defendants' use of "Olympic" in connection with the Gay Games tends to cause confusion, to cause mistake, to deceive or to falsely suggest a connection with USOC activities. Instead, as discussed above, the District Court created a presumption favoring plaintiffs' claim.

The presumption constitutionally imbalanced section 380, insofar as section 380 crystallized Congress' effort to assure trademark protection to "Olympic" in behalf of USOC while protecting First Amendment rights at the same time. As the District Court in the *Fur Information Case*, cited with approval in *S.T.O.P. v. USOC*, cited supra, 489 F.Supp. at 1125, stated:

> "While Congress may limit [first amendment] rights to prevent fraud, copyright infringement or palming off, *such limitation must be drawn narrowly, so as to meet the perceived evil, without unnecessary impingement on the right of free speech.*"
>
> 364 F,Supp. 16, 22 (S.D.N.Y. 1973), affirmed on other

grounds, 501 F.2d 1048 (2d Cir. 1974); cert. denied, 419 U.S. 1022 (1974).
(emphasis added).

When and after Congress enacted section 380, in 1978, hundreds if not thousands of commercial and other uses of the word "Olympic" existed throughout the world. (See Exhibit B to Decl.M.Dunlap in Opp.Mo.Prelim.Inj., filed below and lodged herewith, showing literally hundreds of uses of "Olympic" as reflected in the telephone pages of several cities and states in the U.S. and major cities in other nations). Moreover, within the United States, the word "Olympic" has been and is being used to promote the international "Police Olympics", the "Armenian Olympics", the "Firemen's Olympics", the "Olympics of Ballet", the "Crab-Cooking Olympics", the "Wrist-Wrestling Olympics", and other theatrical and athletic performances, and the District Court below was presented with extensive physical and documentary evidence by defendants, establishing the existence of all of these uses of the word "Olympic(s)". (See Decl.T.Waddell Opp.Mo.Prelim.Inj. and Appendix I, Exhibits F, Z, BB and EE filed below and lodged herewith).

In light of these uses of "Olympic" around the world, and assuming *arguendo* that Congress was constitutionally and legally free in spite of these uses to bestow a right upon USOC to protect its trademark against competition by enactment of section 380, it is obvious that that right of USOC to protect its trademark must be limited by the express language of section 380(a)(4), where use of the word "Olympic" is concerned, as a First Amendment matter. Otherwise, Congress' action is bestowing the word "Olympic" upon the USOC in spite of the numerous and worldwide pre-existent, simultaneous and subsequent uses of "Olympic" in and out of commerce, and in spite of the generic nature of the term "olympic", would directly contradict the necessarily limiting principles of trademark law, including the "fair use in description" exception contained in the Trademark Act of 1946, 15 U.S. Code section 1115(b)(4), and see, e.g.,

Abercrombie & Fitch v. Hunting World Inc., 537 F.2d 4 (2nd Cir. 1976), which exemption defendants claimed below, and the fundamental rule of trademark law that a word in the public domain by virtue of its generic nature (such as "Olympic") may not necessarily be subject to trademark protection. Defendants submit that those doctrines and principles, which are at the heart of qualifying trademark protection of words as an "exception" to the First Amendment prohibition of Congressional enactments that abridge freedom of speech, cannot be cast aside in the interpretation of section 380. Yet the District Court cast precisely those doctrines aside in interpreting section 380 below to apply to defendants' use of "Olympic" that is challenged by plaintiffs at bar.

Defendants contend that section 380 was not designed to prohibit defendants' nonprofit and political-educational use of the term "Olympic" to describe the events that are scheduled to commence in San Francisco on August 28th, 1982. Defendants submit that the District Court's misreading of section 380 to *presume* a violation of section 380 by defendants, accordingly, has resulted in a classic prior restraint upon defendants' use of a word, "Olympic", accomplished by means of a preliminary injunction the violation of which carries punishment by contempt for use of the word in connection with the Gay Games. (See discussion of "prior restraint" doctrine as applied to this case in Defts.Memo. (Opp.Mo.Prelim.Inj., Ex.B to Decl. M.Dunlap Supp.Mo.Stay, filed herewith, at pp. 13-17 thereof.) This Court certainly need not reach the question of unconstitutionality of section 380 as applied to defendants, in order to perceive and correct the governmentally enforced prohibition of free speech and consequent chilling of protected association that have been accomplished by the preliminary injunction issued below. Defendants and every person associated with them have been ordered by the District Court not to use the word "Olympic" in any connection with the Gay Games, or any other performance(s) sponsored by

defendants, because of interpretation of section 380 of the Amateur Sports Act of 1978 that read out the "tending to cause confusion etc." requirement, as to defendants, by reading in a presumption unsupported by law or by the factual record below.

However, if this Court believes that it does need to reach the issue of the unconstitutionality of section 380 as applied to defendants, then defendants would respectfully submit that insofar as Congress' enactment of section 380 can be held to prohibit use of the word "Olympic(s)" to promote athletic competitions, other than those authorized by USOC, regardless of how disassociated and distinct such competitions are and regardless of the political and educational purposes of such other competitions, that prohibition by Congress would infringe the First Amendment rights of myriad groups to speak and associate, including the rights of defendants and gay/lesbian persons, as well as the rights of Armenians, police, firemen, and firewomen, and other groups that stage and promote their own performances, of athletic and/or theatrical natures, using the term "Olympic(s)" to describe and promote such events. Such a prohibition by Congress would also loft the rights of USOC above those of any trademark holder under the Trademark Act of 1946, with its exceptions for use of words "in good faith to describe to users the goods or services of such party", 15 U.S. Code section 1115(b)(4), and above those of any person or corporation seeking to trademark a generic term. Defendants submit that these implications of a reading of section 380 to exclude such uses of "Olympic" as those of defendants at bar do raise grave First Amendment questions. *Cf. S.T.O.P. v. U.S.O.C.*, cited supra, 489 F.Supp. 1126, see discussion of the sometimes troublesome distinction between "talk for profit and talk for other purposes" in L.Tribe, *American Constitutional Law* 624-628, 655-656 (N.Y. 1978).

IV. THE DISTRICT COURT'S PRELIMINARY INJUNCTION LENDS JUDICIAL CREDENCE TO

BLATANT DISCRIMINATION AGAINST DEFENDANTS BY USOC'S REFUSAL TO AUTHORIZE THE GAY OLYMPIC GAMES AND BY ITS LITIGATIVE ATTACK SINGLY UPON THESE GAMES.

It is undisputed that defendants applied for and were refused permission to use the term "Olympic" by USOC. It is also undisputed that USOC has authorized use of "Olympic" by the sponsors of the "Special Olympics" and the sponsors of the "Junior Olympics" and the "Explorer Olympics". Apparently, plaintiffs interpret their authority under the Amateur Sports Act of 1978 as a whole to be selective in authorizing uses of "Olympic" by amateur athletic organizations. It is noted that the "Special Olympics" find specific authority in the Act. 36 U.S. Code section 374(13). However, there is not any parallel authority for the "Junior Olympics" or for the "Explorer Olympics" and, the District Court's recital to the contrary notwithstanding, there is *nothing* of record establishing that these special olympic-style competitions were "grandfathered in" by USOC via section 380(a). (Exhibit A to Decl.Dunlap, p.17 n.5).

In light of the facts that USOC has selected those events for its imprimatur, while not authorizing the Senior Olympics, the Gay Olympic Games or other amateur athletic competitions, it is plain that USOC claims for itself a power to discriminate in approving or disapproving particular amateur athletic organizations and activities. USOC's refusal to authorize use of "Olympic" by defendants consitituted the first layer of such discrimination as focussed against defendants at bar. This discrimination becomes impossible to explain by reference to the Amateur Sports Act of 1978, to which USOC points to explain its authorization of the "Special Olympics", when the record fact that defendants have designed the Gay Games to afford equal opportunities to women and to members of racial and ethnic minorities is taken into account. Section 374(12) and (14) to Title 36 specifically declares that the purposes of the U.S. Olympic Corporation include *encouragement* of amateur athletic

opportunities for those groups, to wit., women and ethnic/racial minorities. Yet the USOC refused to authorize the Gay Games, in obvious contradiction of that declared purpose and goal of the Corporation.

The second layer of discrimination claimed by defendants in this action has been aimed specifically and consciously at defendants SFAA and DR. WADDELL as representatives of gay/lesbian pride and dignity, and the movement for freedom of this oppressed minority. It was established without dispute below that USOC is and has been aware of the international Police Olympics held in 1982 and previously. (Decl.T.Waddell Opp.Mo. Prelim. Inj. filed below, lodged herewith, at p.10 lines 21-28). Yet no legal action, much less any motion for preliminary injunction, has been filed against the Police Olympics sponsors by USOC.

Again going *outside the record,* the District Court sought to respond to the defendants' contention that the USOC's treatment of them vis à vis the Police Olympics constituted obvious discrimination against the Gay Games' sponsors, by relying on a representation by counsel for plaintiffs made in the course of oral argument to support the Court's finding that:

> "...plaintiffs have indicated to the court at oral argument that a number of other potential lawsuits are in the pre-litigation negotiations stage."
> (Exhibit A to Decl.Dunlap, p.15 lines 6-8).

The District Court's reliance upon counsel's oral representation was entirely improper. The representation is also contradicted by Dr. Waddell's declaration under penalty of perjury. (See Decl.T.Waddell, filed below and lodged herewith, at p. 10 lines 21-28).

Nothing of record contradicts the apparent truth that USOC has singled out the Gay Games as a litigative target under section 380. The other suits cited by the District Court involve either efforts of organizations to register "Olympic" as a competing trademark (in the case of the "Golden Age Olympics", for example), or disputes with affiliated organiza-

tions or with corporations purchasing USOC's trademarked goods. Nor does anything of record contradict the position of defendants that they, unlike the Police Olympics sponsors and the myriad sponsors of other Olympic-style athletic competitions, have been picked on by USOC in this lawsuit. The District Court's failure to weigh this evidence of discrimination in determining the equities of plaintiffs' motion, and in measuring the claims of injury of the parties, constitutes an abuse of equitable discretion of the District Court, particularly in light of the District Court's reaching outside the record to find some material that appeared to contradict the claim of discrimination by defendants.

V. THE PROCEEDINGS BELOW WERE CONDUCTED IN A MANNER THAT WAS NOT EVEN SLIGHTLY EQUITABLE AS FAR AS DEFENDANTS ARE CONCERNED.

As noted above, the District Court in this action reached outside the record at two crucial junctures to "find" material to support its ruling against defendants. Moreover, although plaintiffs were ordered to file and serve their moving papers in support of preliminary injunction on August 10th, 1982, plaintiffs kept on filing papers through August 18th, 1982, the date before the hearing on the said motion. The District Court's order relies in part on supplemental declarations filed by plaintiffs on August 16th, 1982, the date upon which defendants' opposition was due (and was filed and personally served). Counsel for defendants submits, respectfully but with a sense of deep inequity in terms of the plaintiffs' behavior under the rules and the District Court's reaching outside the record, that such procedural treatment of these defendants cannot help but reinforce the sense, based in part upon the facts adduced of record showing discrimination by USOC against these defendants, that SFAA, DR. WADDELL and the others enjoined below have been treated unjustly in this litigation to date. Counsel for defendants further notes in this regard that although the District Court itself found as fact that USOC was aware of defendants' use

of "Olympic" as of May 23, 1982, and although defendants showed that it was likely that USOC knew of defendants' use of "Olympic" in February, 1982, the District Court did not hesitate for a moment to find the requisite "irreparable injury" to plaintiffs, in spite of the record fact that plaintiffs took no legal action against defendants until at a minimum two and one-half (2-1/2) months after the plaintiffs claim the "irreparable injury" to them began, waiting until the eve of the Gay Games to bring their suit. In weighing the equities, and in determining the propriety of a preliminary injunction in the case at bar, defendants contend that the District Court's failure to consider plaintiffs' manipulative timing in deciding the genuineness of their claimed injury constituted an abuse of the District Court's equitable discretion in the premises.

VI. CONCLUSION

Because the District Court's preliminary injunction in the case at bar was founded upon an erroneous interpretation of federal law, combined with "findings" of "fact" not of record and contradicted by showings by defendants, and because the District Court's order unnecessarily abridges the rights of defendants and the public to free speech and association, and because the District Court's order reinforces discrimination against defendants by USOC, defendants respectfully urge this Court to order said preliminary injunction to be stayed pending appeal from said order, so that the irreparable injury to defendants that has already been inflicted by this preliminary injunction and by its predecessor t.r.o. may not be aggravated by silencing defendants and deterring their lawful association in the promotion of the "Gay Olympic Games," set to commence on August 28, 1982.

Dated: 23rd August 1982

Respectfully submitted,
By Mary C. Dunlap (Signed)
An Attorney for Defendants

(Certificate of Service Omitted.)

File Date: August 23, 1982

(Names & caption omitted in printing, See J.A. 5, above)

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Declaration of Mary C. Dunlap in Support of Emergency Motion by Defendants for Order Staying or Dissolving Preliminary Injunction (Fed.R.Civ.P. Rule 62; 9th Cir. Rule 6(h); F.R.A.P. Rule 8(a))

I, MARY C. DUNLAP, do hereby declare under penalty of perjury:

1. I am counsel of record for defendants SAN FRANCISCO ARTS & ATHLETS and DR. THOMAS WADDELL in the above-captioned action, and I am a member in good standing of the Bar of this Court.

2. On August 20th, 1982, at 6:00 o'clock p.m., the Honorable U.S. District Judge Robert F. Peckham of the U.S. District Court for the Northern District of California issued a preliminary injunction against defendants SFAA, DR. WADDELL and others, *inter alia*, ordering these persons not to use the word "Olympic" in connection with the Gay Games, which are an international athletic performance that is scheduled to commence in San Francisco, California, on August 28th, 1982, and that has been designed and sponsored by SFAA, a California non-profit corporation, DR. WADDELL, its volunteer Chairman, and dozens of other persons, in order to educate the public as to the health and normalcy of gay and lesbian persons, and to overcome stereotypes and bigotry as to such persons, and to advance the cause of overcoming discrimination on account of sexual orientation. A copy of the District Court's order granting preliminary injunction is appended to this Declara-

tion, marked "Exhibit A" of this Declaration, and referred to in this Declaration and in the Memorandum in Support of this motion as "Exhibit A" hereof.

3. If the aforesaid preliminary injunction is not immediately stayed by order of this Court, defendants and the public will suffer irreparable and unnecessary injury by means of said preliminary injunction, as follows:

a.) Defendants SFAA and DR. WADDELL and all persons associated as volunteers and participants in the Gay Games will be totally and harmfully deprived of their claimed right to use the word "Olympic" in conjunction with, and to describe, the events of August 28th-September 5, 1982, including but not limited to their claimed right to distribute posters, tee shirts and other paraphernalia containing the phrase "GAY OLYMPIC GAMES", their claimed right to speak of the "GAY OLYMPIC GAMES", and their claimed right to associate in the production and staging of the "GAY OLYMPIC GAMES";

b.) Defendant SFAA, a California non-profit corporation, whose specific corporate purpose as recited in its bylaws is, by means of promoting and supporting public cultural and athletic activities, to "educate the general public on the vitality, variety and versatility of the gay movement", will suffer an incalculable and irreparable diminution of its ability to fulfill that purpose, by means of having been enjoined from using the word, "Olympic", not only as said word appears in the literature, paraphernalia and other materials of SFAA, but also as said word is used orally to describe the Gay Games;

c.) Each of the dozens of volunteers who have been and are laboring to plan, stage, co-ordinate and present the Gay Games, as well as the more than one thousand (1,000) persons who are coming to participate in said Games athtletically, will suffer the irreparable injury of being enjoined by Court order from using the word "Olympic" in any connection with said Games.

4. On August 23, 1982, in the morning, I personally

notified Mr. Vaughn Walker, of Pillsbury Madison & Sutro, attorney for plaintiffs in this action, that I was moving the District Court for a stay of its preliminary injunction, and that, failing said motion, that I was filing this motion in this Court. I personally delivered a copy of all of the moving papers in this matter to the offices of Pillsbury, Madison & Sutro, at 225 Bush Street, San Francisco, California, on August 23, 1982.

5. The instant motion is of an emergency nature, in the definition of Rule 6(h) of the Rules of this Court and of Rule 8(a) of the Federal Rules of Appellate Procedure because, absent an order by this Court staying or dissolving the preliminary injunction, the injuries to defendants and to the public as described above will be immediate, and will be incapable of repair by legal remedy, regardless of the outcome of the appeal from said preliminary injunction and regardless of the outcome of the action on the merits, or of any counterclaim that defendants may interpose, below.

6. Pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure, I submit the following items from the record below that are relevant to the disposition of this motion for stay or dissolution of the preliminary injunction issued by the District Court:

A copy of Defendants' Memorandum of Points and Authorities in Opposition To Plaintiffs' Motion for Preliminary Injunction, etc., filed below, attached hereto and marked "Exhibit B" of this Declaration.

Copies of Declarations Of Defendant DR. THOMAS WADDELL, and of Mary C. Dunlap, and Exhibits thereto, and of declarations of other volunteers involved in the Gay Games, which are lodged herewith (for lack of extra copies in this urgent time frame).

Copies of the moving papers filed by plaintiffs below, which are lodged herewith (for lack of extra copies in this urgent time frame).

Stay denied by District Court 8/23/82 2:00p.m. MCD

Dated: August 23rd, 1982

Mary C. Dunlap (Signed)
Declarant

File Date: August 24, 1982

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

INTERNATIONAL OLYMPIC COMMITTEE, a corporation organized and existing under the laws of Switzerland; UNITED STATES OLYMPIC COMMITTEE, a corporation organized and existing under the laws of the United States of America;

Plaintiffs,

vs.

SAN FRANCISCO ARTS & ATHLETCS, a California corportion; THOMAS F. WADDELL,

Defendants.

No. C-82-4183 RFP

Preliminary Injunction

This matter having come on for consideration of plaintiffs' request for preliminary injunction pursuant to the temporary restraining order and order to show cause issued by the Court on August 9, 1982; and the Court having conducted the show cause hearing on August 19, 1982, issued its order on August 20, 1982 granting plaintiffs' request for a preliminary injunction and made the findings of fact and conclusions of law set forth in the order, now therefore:

IT IS ORDERED that:

Defendants, their employees, agents, officers, attorneys and representatives, all persons participating with or acting in concert with them, and each of them shall immediately cease, desist and refrain from further use of "Olympic" or "Olympiad" or any confusingly similar word, term, name, trade name or any symbol, emblem, trademark or ensignia of the International Olympic Committee or the United States Olympic Committee, or any combinations or simulations thereof, for the purpose of trade, to induce the sale of any goods or services, or in connection with any advertising, promotion, publicity or production of any theatrical exhibition, athletic performance, competition or event pursuant to 36 U.S.C. § 380.

Plaintiffs shall file a bond in the amount of $1000 and serve a copy of the bond and this preliminary injunction upon defendants.

Dated: August 23, 1982

William W. Schwarzer (Signed)
United States District Judge

(Certificate of service omitted.)

File Date: August 23, 1982

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

INTERNATIONAL OLYMPIC COMMITTEE, etc., et al.,

Plaintiffs,

v.

SAN FRANCISCO ARTS AND ATHLETICS, INC., et. al.,

Defendants.

NO. C-82-4183-RFP

Order

Good cause appearing, defendants' ex parte motion for a stay of the preliminary injunction issued by this Court on August 20, 1982, is hereby denied.

IT IS SO ORDERED.

DATED: August 23, 1982

William W. Schwarzer (Signed)
United States District Judge

(Certificate of service omitted.)

File Date: August 27, 1982

(Names & caption omitted in printing, see J.A. 62, above)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Answer to Complaint and Counterclaims of Defendants for Injunctive and for Injunctive and Declaratory Relief and Monetary Damages

(Copyright/Trademark/Unfair Competition/Rights to Free Speech and Association/Equal Protection of the Laws)

Defendants SAN FRANCISCO ARTS & ATHLETICS INC. and THOMAS F. WADDELL (below, "Defendants") hereby answer the Complaint filed in this action on August 9, 1982 and admit, deny and aver as follows:

1. Answering Paragraph 1, defendants admit that this is an action brought by plaintiffs pursuant to the statutes and laws recited in paragraph 1 of the Complaint. Except as expressly

so admitted, defendants deny each and every allegation of Paragraph 1 of the Complaint.

2. Answering Paragraph 2, defendants admit that plaintiffs purport to be nonprofit organizations and defendants admit the origin of plaintiff International Olympic Committee (below "IOC") and the principal places of business of plaintiffs recited in Paragraph 2, and defendants admit that plaintiff United States Olympic Committee (below, "USOC") does business in California and elsewhere. Except as expressly so admitted, defendants deny that plaintiffs USOC is a private corporation and defendants aver that for all purposes relevant in this action plaintiff USOC is acting and has acted as a public, governmental and/or quasigovernmental entity, and defendants further aver that plaintiff USOC is performing public and governmental functions in the United States and is receiving, being given, using and borrowing public resources of the people of the United States and of the State of California and of the City and County of Los Angeles. Except as expressly so admitted, defendants deny each and every one of the allegations of Paragraph 2 of the Complaint.

3. Defendants admit that SAN FRANCISCO ARTS & ATHLETICS INC. (below, "SFAA") is a corporation organized and existing under the laws of the State of California, and that the principal place of business of SFAA is the City and County of San Francisco. Defendants further aver that SFAA is a California non-profit corporation. Defendants admit that THOMAS F. WADDELL is a resident of San Francisco, California, and a founder and organizer of SFAA. Except as expressly so admitted, defendants deny each and every allegation of Paragraph 3 of the Complaint.

4. Defendants admit that the 1984 Olympic Games are scheduled to be held in Los Angeles, California. Except as expressly so admitted, defendants deny each and every allegation of Paragraph 4 of the Complaint, for lack of information and belief, and defendants further aver that the

allegations of Paragraph 4, lines 5-10, are argumentative and conclusory.

5. Defendants admit the substantial accuracy of Paragraph 5 of the Complaint.

6. Answering Paragraph 6, defendants admit the substantial accuracy of Paragrah 6 except insofar as said Paragrah alleges the carrying of a flaming Olympic torch across the United States, and as to said allegation, defendants specifically deny that said torch is "Olympic" in the sense of belonging to plaintiffs in any way.

7. Answering Paragraph 7, defendants admit that, except for a brief period in early 1982, and until August 9, 1982, defendants have described and promoted the athletic events sponsored by SFAA and scheduled to occur on August 28th through September 5th, 1982 as the "Gay Olympic Games", and have published a newsletter entitled "Gay Olympic Newsletter", and have printed or caused to be printed and have distributed brochures, flyers, tee shirts and other materials contining the phrase "Gay Olympic Games". Except as expressly so admitted, defendants deny each and every allegation of Paragraph 7 of the Complaint.

8. Answering Paragraph 8, defendants deny each and every allegation of Paragraph 8 of the Complaint.

9. Answering Paragraph 9, defendants admit that a letter dated December 23, 1981 signed by F. Don Miller, Executive Director of the USOC, was sent to "Gay Olympic Games" concerning use of the word "Olympic" and defendants admit that for a brief period in early 1982 defendants described the scheduled events of August 28-September 5, 1982 as the "Gay Athletic Games". Except as expressly so admitted, defendants deny each and every allegation of Paragraph 9 of the Complaint.

10. Defendats deny each and every allegation of Paragraphs 10, 11, 12 and 13 of the Complaint.

11. Defendants answer Paragraph 14 of the Complaint by incorporating their admissions, denials and averments as to Paragraphs 1 through 9 and 11 through 13 in their Answer in

response to Paragraph 14.

12. Answering Paragraph of the Complaint, defendants deny each and every allegation of Paragraph 15 for lack of information and belief, and defendants further aver that the allegations of Paragraph 15 are argumentative and conclusory.

13. Defendants deny each and every allegation of Paragraph 16 of the Complaint.

14. Defendants answer Paragraph 17 of the Complaint by incorporating their admissions, denials and averments as to Paragraphs 1 through 9 and 11 through 13 in their Answer in response to Paragraph 17.

15. Defendants deny each and every allegation of Paragraph 18, and defendants further aver that the allegations of Paragraph 18 are argumentative and conclusory.

16. Defendants deny each and every allegation of Paragraph 19, of the Complaint for lack of information and belief.

17. Defendants deny each and every allegation of Paragraph 20 of the Complaint.

18. Defendants answer Paragraph 21 of the Complaint by incorporating their admitssions, denials and averments as to Paragraphs 1 through 9, 11 through 13 and 18 through 19 in their Answer in response to Paragraph 21.

19. Defendants deny each and every allegation of Paragraph 20 [sic] at p.7 lines 24-32 and p.8 lines 1-4 for lack of information and belief, and defendants further aver that the allegations of Paragraph 20 [sic] are argumentative and conclusory.

20. Answering Paragraph 23, defendants admit that they have used the word "Olympic" only in connection with the Gay Olympic Games scheduled for August 28-September 5, 1982, as a descriptive term, and defendants aver that they sought permission from defendant USOC for said usage of the word "Olympic". Except as expressly so admitted, defendants deny each and every allegation of Paragraph 23 of the Complaint.

21. Defendants deny each and every allegation of Paragraph 24 of the Complaint.

22. Defendants answer Paragraph 25 of the Complaint by incorporating their admissions, denials and averments as to Paragraphs 1 through 9, 11 through 13, and 18 through 19 in their Answer in response to Paragraph 25.

23. Defendants admit the substantial accuracy of Paragraph 26 of the Complaint.

24. Defendants deny each and every allegation of Paragraph 27 of the Complaint.

25. Defendants deny each and every allegation of Paragraph 28 of the Complaint, and defendants further aver that the allegations of Pragraph 28 are argumentative and conclusory.

26. Defendants admit that defendants assert a legal right to use the word "Olympic" in description and promotion of the Gay Games scheduled for August 28-September 5, 1982. Except as expressly so admitted, defendants deny each and every allegation of Paragraph 29 of the Complaint.

27. Defendants answer Paragraph 30 of the Complaint by incorporating their admissions, denials and averments as to Paragraphs 1 through 9, 11 through 13, and 18 through 19 in their Answer in response to Paragraph 10.

28. Defendants deny each and every allegation of Paragraph 31 of the Complaint.

29. Defendants deny each and every allegation of Paragraph 32 of the Complaint.

30. Answering Paragraph 33, defendants admit that for a brief period in early 1982, defendants temporarily ceased use of the word "Olympic" and they used the term "Athletic" to describe the Gay Games, and defendants further aver that the temporary cessation of use of the term "Olympic" was intended by defendants as a temporary measure only, to enable defendants to gain legal advice and counsel as to defendants' right in relation to use of the term "Olympic"; defendants further aver that during the effective periods of the temporary restraining order and the preliminary injunc-

tion in this action, defendants have obeyed said orders in relation to use of the word "Olympic". Except as expressly so admitted, defendants deny each and every allegation of Paragraph 33 of the Complaint.

31. Answering Paragraph 34, defendants admit that defendants assert a right to use the word "Olympic" in description and promotion of the Gay Games scheduled for August 28-September 5, 1982. Except as expressly so admitted, defendants deny each and every allegation of Paragraph 34 of the Complaint.

32. Defendants answer Paragraph 35 of the Complaint by incorporating their admissions, denials and averments as to Paragraphs 1 through 9, 11 through 13, and 18 through 19 in their Answer in response to Paragraph 35..

33. Defendants deny each and every allegation of Paragraphs 36 and 37 of the Complaint.

WHEREFORE, defendants pray for judgment as hereinafter set forth.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs' Complaint fails to state any claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs' causes of action and prayer for relief are barred by the doctrine of laches.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs' causes of action and prayer for relief are barred by the doctrine of unclean hands.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' causes of action and prayer for relief are barred by the First Amendment to the United States Constitution.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' causes of action and prayer for relief are barred by the Fifth and Fourteenth Amendments to the United States Constitution.

SIXTH AFFIRMATIVE DEFENSE

The Court lacks jurisdiction of the subject matter of plaintiffs Sixth Claim For Relief insofar as plaintiffs rely therefor upon the doctrine of pendent jurisdiction, in that the said Sixth Claim for Relief is not an appropriate subject for the exercise of pendent jurisdiction by the Court.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' causes of action and prayer for relief are barred by the doctrines of abandonment, waiver and estoppel, insofar as plaintiffs claim a right to sue the word "Olympic" exclusive of all other suers, in that plaintiffs have abandoned and waived protection of said term in its usages in commerce, and must therefore be estopped from seeking to enforce any claim(s) to the word "Olympic" as to defendnats' use of said term.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' causes of action and prayer for relief are barred by the defense of fair use in description, as codified in 15 U.S.Code section 1115, in that said defense applies to protect defendants' use of the word "Olympic" of which plaintiffs complain.

NINTH AFFIRMATIVE DEFENSE

Plaintiffs' causes of action and prayer for relief are barred by the facts that "Olympic" has a generic meaning and is in the public domain.

TENTH AFFIRMATIVE DEFENSE

As between plaintiff International Olympic Commiittee (IOC) and defendants, there is no case or controversy presented in plaintiffs' Complaint, in that plaintiff IOC has accepted the generic nature of the word "Olympic" and no longer seeks to prevent the use of "Olympic".

WHEREFORE defendants pray for judgment as follows:

1. That plaintiffs take nothing by reason of their Complaint;

2. That judgment be entered in favor of defendants and against plaintiffs and the Complaint be dismissed with prejudice;

3. For costs incurred by defendants in this action, including but not limited to reasonable attorneys' fees to defendants in this action pursuant to 15 U.S. Code section 1116 and 42 U.S.Code section 1988;

4. For such other and further relief as the Court may deem proper.

Dated: August 27th, 1982

By: Mary C. Dunlap (Signed)
An Attorney for Defendants

COUNTERCLAIMS

Defendants and counterclaimants SFAA and DR. THOMAS F. WADDELL (below, "counterclaimants") hereby counterclaim against plaintiffs above-named as follows, and allege:

1. Counterclaimant SAN FRANCISCO ARTS & ATHLETICS INC. ("SFAA") is an entity organized and operating pursuant to the laws of the State of California as a non-profit corporation, for charitable, cultural and educational purposes.

2. Counterclaimant DR. WADDELL is a founder of SFAA and a creator of the Gay Games of 1982. DR. WADDELL's work in behalf of SFAA is and at all times herein relevant has been voluntary and unpaid.

3. The Gay Games of 1982 have been designed, promoted, staged and organized by SFAA, DR. WADDELL and others, and the word "Olympic" has been used in conjunction with said Gay Games of 1982, to advance the causes of equal treatment, freedom and dignity for all persons, regardless of sexual orientation.

4. Plaintiff United States Olympic Committee (USOC) has authorized uses of the word "Olympic" to persons for the purpose of trade, to induce the sale of goods and services,

and to promote theatrical exhibitions, athletic performances and athletic competitions.

5. Plaintiff USOC by its agents has intentionally discriminated against gay and lesbian individuals and against organizations of gay and lesbian persons, including counterclaimants, by means including but not limited to denying permission to such persons and groups to use the word "Olympic" in conjunction with amateur athletic performances and competitions while allowing use of the word "Olympic" to other individuals and organizations similarly situated, and by refusing and failing to support, assist, authorize and encourage amateur athletic opportunities for gay and lesbian persons, and upon information and belief, by threatening, menacing and harassing one or more proposed participants in the proposed Gay Games of 1982 who is/are amateur athletes and who may qualify to compete in the Olympic Games set for 1984 in Los Angeles, California.

6. Plaintiff USOC performs governmental functions, including but not limited to governing, regulating, sponsoring, authorizing and funding amateur athletic activities in the United States.

7. Plaintiff USOC receives and has received financial assistance and funding from the United States government, and, upon information and belief, from sub-federal governmental agencies in the United States.

8. Upon information and belief, plaintiffs USOC and IOC have used and they will continue to use publicly owned facilities and resources in and beyond the State of California in relation to the 1984 Olympic Games which are scheduled to be held in Los Angeles, California.

9. Upon information and belief, one of the attorneys representing USOC and IOC in this action, Mr. Vaughn Walker, stated to one or more reporters, in a statement that was aired or broadcast on Channel 4, KRON-TV, San Francsico, California, during the pendency of this action, that USOC and/or IOC is/are suing defendants SFAA and DR. WADDELL because, words to the effect of, "they are

not a suitable group".

10. Upon information and belief, plaintiff USOC and its Executive Director, F. Don Miller, have brough no litigation against the Police Olympics' sponsors, the Armenian Olympics' sponsors, the Senior Olympics' sponsors, and other simiarly situated sponsors, while USOC and IOC have brought an action against counterclaimants, because USOC by its agents including Executive Director Miller have a specific discriminatory motive and intent as to counterclaimants as they are representatives of gay/lesbian persons, to wit., animosity and ill-will directed against gay/lesbian persons.

11. Upon information and belief, plaintiff IOCC by its Committee Director Monique Berlioux and/or other agents of IOC at times relevant to the period of this litigation have taken the position that the word "Olympic" is generic, and IOC no longer seeks to control use of the word "Olympic", in spite of IOC's posture as a plaintiff in the action against counterclaimants.

12. Upon information and belief, athletic performances and competitions entitled, termed and/or described as "Olympic" or "Olympics" have occurred for at least two thousand eight hundred (2800) years, and the term "Olympic" and its derivatives are of antique, classical origin.

13. Upon information and belief, the word "Olympic" is used by millions of persons throughout the Wordl for a variety of commercial and non-commercial purposes, and said usage began more than two thousand (2,000) years prior to the bringing of suit by USOC and IOC against counterclaimants.

14. The litigation by plaintiffs USOC and IOC against counterclaimants, and specifically the temporary restraining order and preliminary injunction issued in said litigation, have caused financial damages to SFAA, in an amount as yet unascertained but which will be proved at trial of this action; said damages have resulted from the deprivation of use of the word 'Olympic" to counterclaimants.

15. Counterclaimants and the general public have been damaged and, absent injunctive relief upon this counterclaim, they will continue to be damaged, in a manner irreparable at law, by deprivation to them of the use of the word "Olympic" cause by plaintiffs' suit against SFAA and DR. WADDELL.

16. There exists an apparent controversy between palintiffs and counterclaimants as to their respective rights to use the word "Olympic". Said controversy can only be justly, equitably and legally resolved by the issuance of a declaratory judgment establishing the rights of SFAA and DR. WADDELL to use the word "Olympic" under law.

FIRST CAUSE OF ACTION

17. Counterclaimants reallege and incorporate in this First Cause of Action each of paragraphs 1-16 of these counterclaims, inclusive, above.

18. Plaintiffs IOC and USOC have acted in violation of the rights of SFAA, DR. WADDELL and the general public to speak and associate, as guaranteed by the First Amendment to the U.S. Constitution.

WHEREFORE, counterclaimants pray for judgment against plaintiffs as set forth below.

SECOND CAUSE OF ACITON

19. Counterclaimants reallege and incorporate in this Second Cause of Action each of paragraphs 1-16 of these counterclaims, inclusive, above.

20. Plaintiffs IOC and USOC have acted in violation of the rights of SFAA and DR. WADDELL and of gay and lesbian persons who are citizens of the United States to the equal protection of the laws, as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

WHEREFORE, counterclaimants pray for judgment against plaintiffs as follows:

1. That this Court grant preliminary and permanent injunctions, preventing USOC and IOC, their agents, and each of them, from taking any action to interfere with the use

of the word "Olympic" by counterclaimants, in conjunction with the nonprofit activities of SFAA, to promote and to sell items to pay the costs of, lawful activities of SFAA;

2. That this Court issue a declaratory judgment establishing the right of SFAA, DR. WADDELL and all others in association with them to use the word "Olympic" in conjunction with the non-profit activities of SFAA, to promote and to sell items to pay the costs of, lawful activities of SFAA, and including, if necessary, a declaration that 36 U.S. Code section 380 is unconstitutional as applied to counterclaimants in this action;

3. That this Court order plaintiffs IOC and USOC to pay damages to SFAA caused by plantiffs' suit agianst SFAA and DR. WADDELL in an amount in conformance with proof at trial of this action;

4. That this Court order plaintiffs USOC and IOC to pay the costs of SFAA and DR. WADDELL that have been incurred by counterclaimiants in the prosecution of these Counterclaims, including but not limited to reasonable attorneys' fees incurred by counterclaimants in conformance with 42 U.S. Code section 1988.

5. For such other and further relief as the Court may deem proper.

Dated: August 27, 1982

By: Mary C. Dunlap (Signed)
An Attorney for Counterclaimants/Defendants